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6

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF INDIANA,
WITH TABLES OF CASES REPORTED AND CITED, AND STATUTES
CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.
JOHN W. DONAKER, Ass't Reporter.

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TABLE OF THE CASES

REPORTED IN THIS VOLUME.

Abbitt, Admx., v. Lake Erie, etc., R. W. Co.....	498	City National Bank, Goshen Woolen Mills Co. v.....	279
Adams, Allen v.	409	City of Greensburg, Powell v.....	148
Adams School Tp. v. Irwin..	12	Clark, Roach v.....	93
Allen v. Adams.....	409	Close v. Pittsburgh, etc., R. W. Co.	560
Baker v. Cravens.....	199	Clow v. Brown.....	185
Baltimore, etc., R. W. Co., Rodgers v.	398	Coburn, Building and Loan Ass'n v.	664
Baltimore, etc., R. W. Co. v. Town of Walkerton.....	708	Coburn v. Sands	141
Bank of Commerce v. First Nat'l Bank	588	Collier v. Collier	276
Barker v. Prizer.....	4	Cooper v. Bartlett	603
Barnard v. State	701	Cravens, Baker v.....	199
Bartlett, Cooper v.....	693	Cregor, Admx., Cincinnati, etc., R. R. Co. v.....	625
Baum v. Thoms.....	378	Crowe, State, ex rel., Bishop v.	455
Bealer v. State	391	Crum, Sheets v.	701
Blair v. Curry.....	99	Curry, Blair v.....	99
Board of Regents, etc., v. Daily, Aud.....	668	Daily, Aud., Board of Re- gents, etc., v.....	668
Bookout v. Bookout	63	Daniels v. State.....	348
Boyd v. Radabaugh.....	394	Davis v. Mendenhall, Tr....	205
Brown, Clow v.	185	Davis v. Schlemmer, Admr....	472
Brubaker, Admr., Jarrell, Sheriff, v.	260	Davis v. Union Trust Co., Admr.	46
Building and Loan Ass'n v. Coburn	684	Demaree v. Johnson	419
Calumet Canal, etc., Co., Ma- son v.....	699	Downey, Lowry v.....	364
Campbell v. State.....	74	Drew v. Town of Geneva....	662
Carmel Natural Gas, etc., Co. v. Small	427	Durand, Parsons v.....	203
Center School Tp. v. State, ex rel., Board of School Commissioners	168	Ervin v. State, ex rel., Wal- ley	332
Chicago, etc., R. W. Co. v. Higgins	829	Evans v. State.....	651
Chicago, etc., R. R. Co. v. John, Treas.....	118	Finch, Watson v.....	183
Cincinnati, etc., R. R. Co. v. Cregor, Admx.....	625	First Nat'l Bank, Bank of Commerce v.....	588
		Fourth National Bank, Hawk- ins, Rec., v.....	117
		Fraze, Pittsburgh, etc., R. W. Co. v.	576

Garrison v. Garrison	417	Mason v. Calumet Canal, etc., Co.	699
Gates v. Haw	370	Mathews, State, ex rel., Mc- Wylle v.	597
Gates, Newman v.	59	McFadden v. Owens	213
George v. Town of Walkerton	703	McIntosh v. Zaring	301
Goshen Woolen Mills Co. v. City National Bank	279	Mendenhall, Tr., Davis v....	205
Halstead v. Jessup	85	Meredith v. Meredith	299
Hankins, Warford v.....	489	Milligan, Magel v.....	582
Harlow, Thompson v.....	450	Moore, Mortgage Trust Co. v.	465
Hathaway, Robinson & Co. v.	879	Mortgage Trust Co. v. Moore.	465
Haw, Gates v.....	370	Mozingo v. Ross	688
Hawkins, Rec., v. Fourth Na- tional Bank	117	National Home Building Ass'n v. Huntsinger	702
Heal v. Niagara Oil Co.....	483	Newman v. Gates	59
Hedges, Richardson v.....	53	Newton v. Roper	630
Hendricks, Nutter v.....	605	Niagara Oil Co., Heal v.....	483
Hicks v. State	293	Nutter v. Hendricks	605
Higgins, Chicago, etc., R. W. Co. v.	329	O'Brien, Salem-Bedford Stone Co. v.	656
Hockemeyer v. Thompson...	176	Ohio Oil Co., Lippincott Glass Co. v.	695
Holliday, State Board of Tax Commissioners v.	216	Ohio Oil Co., State v.....	21
Holloway, Sharts v.....	403	Ohio Oil Co. v. State	694
Hunter v. State	696	Ohio Oil Co. v. State	698
Huntsinger, National Home Building Ass'n v.....	702	Ohio Oil Co. v. State.....	698
Irwin, Adams School Tp. v... 12		O'Mara, Admx., v. Wabash R. R. Co.	648
Jarrell, Sheriff, v. Brubaker, Admr.	260	Overshiner, Magee v.....	127
Jessup, Halstead v.....	85	Owens, McFadden v.....	213
John, Treas., Chicago, etc., R. Co v.....	113	Parsons v. Durand	203
Johnson, Demaree v.....	419	Paul v. Town of Walkerton.	565
Kelley, Zumpfe v.	634	Pittsburgh, etc., R. W. Co., Close v... ..	560
Kennedy v. Kennedy	636	Pittsburgh, etc., R. W. Co. v. Fraze ..	576
Kinsley, Gdn., v. Kinsley... 67		Pittsburgh, etc., R. W. Co. v. Town of Crown Point ...	536
Kling, Roller v.	159	Powell v. City of Greens- burg ..	148
Koerner, Aud., v. State, ex rel., Durlauf	695	Prizer, Barker v.....	4
Kuper, Wood v.	622	Radabaugh, Boyd v.....	394
Lake Erie, etc., R. W. Co., Abbott, Admx., v.....	498	Renbarger, Wintrobe v.....	556
Lewis, Admr., v. Watkins... 108		Richardson v. Hedges	53
Lippincott Glass Co. v. Ohio Oil Co.	695	Roach v. Clark	93
Lowry v. Downey	364	Robinson & Co. v. Hathaway.	679
Magee v. Overshiner	127	Rodgers v. Baltimore, etc., R. W. Co.	398
Magel v. Milligan.....	582	Roller v. Kling.....	159
Marshall v. Seamen	1	Roper, Newton v.	630
		Ross, Mozingo v.	688
		Runner, Assignee, v. Scott, Exr.	441

TABLE OF CASES REPORTED.

v

Salem-Bedford Stone Co. v. O'Brien	656	State, ex rel., Walley, Ervin v.	332
Sands, Coburn v.	141	Sutherland v. State	154
Schlemmer, Admr., Davis v.	472		
Scott, Exr., Runner, Assignee, v.	441	Thompson v. Harlow	450
Seamen, Marshall v.	1	Thompson, Hockemeyer v.	176
Seisler v. Smith	88	Thoms, Baum v.	378
Sharts v. Holloway	403	Tindall, Watson v.	488
Sheets v. Crum	701	Tormoehlen, Singer, Admr., v.	287
Shenk, Vansickle v.	413	Town of Crown Point, Pittsburgh, etc., R. W. Co. v.	536
Singer, Admr., v. Tormoehlen	287	Town of Geneva, Drew v.	662
Small, Carmel Natural Gas, etc., Co. v.	427	Town of Walkerton, Baltimore, etc., R. W. Co. v.	703
Smith, Seisler v.	88	Town of Walkerton, George v.	708
State, Barnard v.	701	Town of Walkerton, Paul v.	565
State, Bealer v.	391		
State, Campbell v.	74	Union Trust Co., Admr., Davis v.	46
State, Daniels v.	348		
State, Evans v.	651	Vancleave v. State	273
State, Hicks v.	203	Vansickle v. Shenk	413
State, Hunter v.	606		
State v. Ohio Oil Co.	21	Wabash R. R. Co., O'Mara, Admx., v.	648
State, Ohio Oil Co. v.	604	Walker v. Walker	317
State, Ohio Oil Co. v.	608	Warford v. Hankins	489
State, Sutherland v.	154	Watkins, Lewis, Admr., v.	108
State, Vancleave v.	273	Watson v. Finch	183
State, Wilson v.	697	Watson v. Tindall	488
State, Zellinski v.	700	Webster, State, ex rel., Burroughs v.	607
State Board of Tax Commissioners v. Hollday	216	Wilson v. State	697
State, ex rel., Bishop v. Crowe	455	Wintode v. Renbarger	556
State, ex rel., Board of School Commissioners, Center School Tp., v.	168	Wood v. Kuper	622
State, ex rel., Burroughs v. Webster	607	Wood, Admx., v. Wood	600
State, ex rel., Durlauf, Koerner, Aud., v.	695		
State, ex rel., McWylie v. Mathews	597	Zaring, McIntosh v.	301
		Zellinski v. State	700
		Zumpfe v. Kelley	634

TABLE OF THE CASES

CITED IN THIS VOLUME.

Abshire v. Williamson, 149 Ind. 248	708	Backer v. Pyne, 130 Ind. 288	477
Achilles v. Achilles, 151 Ill. 136.....	647	Bailey v. Rinker, 146 Ind. 129	449, 451, 554
Adams Express Co. v. Indiana, 165 U. S. 255	28	Baker v. Allen, 92 Ind. 101....	271
Adams Ex. Co. v. Ohio State Auditor, 166 U. S. 185.....	249	Baker v. Baker, 2 S. D. 261....	496
Aetna Ins. Co. v. Kittles, 81 Ind. 96	342	Baker v. Horsey, 21 Ind. 246....	655
Alkire v. Alkire, 134 Ind. 350. 67		Baker v. Leathers, 3 Ind. 558....	301
Allen v. Davis, 99 Ind. 216....	396	Baker v. Merriam, 97 Ind. 539	474
Allen v. Davis, 101 Ind. 187....	396	Baker v. Neff, 73 Ind. 68....	440
Allyn v. Boston, etc., R. R. Co., 105 Mass. 77.....	525	Baker v. Pyatt, 108 Ind. 61....	347
Alsop v. Hutchings, 25 Ind. 347	504	Baldwin v. Sutton, 148 Ind. 591	290
Amick v. Butler, 111 Ind. 578....	247	Balfe v. Lammers, 109 Ind. 347	555
Amos v. Amos, 117 Ind. 19....	469	Baltimore, etc., R. R. Co. v. Board, etc., 73 Ind. 213....	571
Anderson v. Ackerman, 88 Ind. 481	278, 312	Baltimore, etc., R. W. Co. v. Thomas, 60 Ind. 107.....	400
Anderson, etc., Association v. Thompson, 88 Ind. 414.....	435	Bank of Savings v. Collector, 3 Wall 495.....	387
Andrews v. Andrews, 8 Conn. 79	643	Bansemmer v. Mace, 18 Ind. 27	462
Appeal of Robeson, 117 Pa. St. 628	504	Barmore v. State Board Medical Examiners, 21 Or. 301..	617
Argenti v. City of San Francisco, 16 Cal. 255.....	171	Barth v. Lines, 118 Ill. 374....	643
Armstrong v. Cavitt, 78 Ind. 476	110	Barton v. Beatty, 28 N. J. Eq. 412	98
Armstrong v. Dunn, 143 Ind. 433	307	Barton v. Thompson, 56 Ia. 571	417
Armstrong v. Farmers' Nat'l Bank, 130 Ind. 508.....	475	Bass v. Elliott, 105 Ind. 517....	102
Attorney General v. Jamaica Pond Aqueduct, 133 Mass. 361	89	Bateman v. Miller, 118 Ind. 345	267
Attorney General v. Saggars, 1 Price 182.....	354	Bauer v. City of Indianapolis, 99 Ind. 56.....	292
Ayres v. State, 21 Tex. App. 399	77	Bayless v. Glenn, 72 Ind. 5....	655
		Beal v. Ray, 17 Ind. 554.....	425
		Bealer v. State, 150 Ind. 391....	701
		Beavers v. State, 58 Ind. 530....	104
		Beeter v. Sellers, 102 Ind. 458....	102
		Behrley v. Behrley, 93 Ind. 255	325, 328

TABLE OF CASES CITED.

vii

Belshaw v. Bush, 11 C. B. 191	477	Blough v. Parry, 144 Ind. 463	161, 164, 165, 276
Bement v. May, 135 Ind.	670.458	Board, etc., v. Bunting, 111 Ind. 143	230
Bennett v. Closson, 138 Ind. 542	93	Board, etc., v. City of Terre Haute, 147 Ind. 134.....	578
Bennett v. Mattingly, 110 Ind. 197	485	Board, etc., v. Davis, 136 Ind. 503	68
Berkey, etc., Co. v. Hascall, 123 Ind. 502.....	483	Board, etc., v. Gwin, Sheriff, 136 Ind. 562.....	231
Berkshire v. Shultz, 25 Ind. 523	313	Board, etc., v. Hall, 70 Ind. 469	430
Berry v. Makepeace, 3 Ind. 154	382, 383	Board, etc., v. Heaston, 144 Ind. 583	622
Bessette v. State, 101 Ind. 85.276		Board, etc., v. Huff, 91 Ind. 333	547
Bever v. Bever, 144 Ind. 157..492		Board, etc., v. Huffman, 134 Ind. 1.....	403
Bevier v. Kahn, 111 Ind. 200..452		Board, etc., v. Jameson, 86 Ind. 154.....	345
Bexar, etc., Association v. Robinson, 78 Tex. 163.....	382	Board, etc., v. State, ex rel., 116 Ind. 329.....	600
Bexar, etc., Association v. Robinson, 22 Am. St. 41....	388	Board, etc., v. Whittaker, 81 Ind. 297	676
Bibber v. Simpson, 59 Me. 181	617	Bolin v. Simmons, 81 Ind. 92.200	
Bicknell v. Widner School Township, 73 Ind. 501.....	171	Boring v. State, 141 Ind. 640..650	
Big Four Building, etc., Asso- ciation v. Olcott, 148 Ind. 176	703	Boruff v. Stipp, 126 Ind. 32... 73	
Billman v. Indianapolis, etc., R. R. Co., 76 Ind. 166.....	402	Bottles v. Miller, 112 Ind. 584	692, 693
Binford v. Adams, 104 Ind. 41	476, 477, 481, 497	Bowen v. Phillips, Admr., 64 Ind. 226	384
Binford v. Young, 115 Ind. 174	390	Bowen v. Swander, 121 Ind. 164	70
Binns v. State, 66 Ind. 428... 85		Bower v. Bower, 146 Ind. 393	161
Blaschov v. Mikels, 147 Ind. 115	630	Boyd v. Fitch, 71 Ind. 306....690	
Bishop v. Moorman, 98 Ind. 1.431		Boyer v. Jones, 14 Ind. 354...248	
Bishop v. Rowe, 71 Me. 263..482		Boyer v. Robertson, 144 Ind. 604	127, 373
Bishop v. State, ex rel., 149 Ind. 223	462	Bozeman v. Cale, 139 Ind. 187	703
Bitting v. Ten Eyck, 85 Ind. 357	285	Bradford v. School Town of Marion, 107 Ind. 280....93, 607	
Blackman v. State, 12 Ind. 556	462	Brady v. Sweetland, 18 Kan. 41	204
Blair v. Blair, 131 Ind. 194...102		Brannen v. Kokomo, etc., Gravel Road, 115 Ind. 115..514	
Blair v. Curry, 150 Ind. 99.50, 51		Branson v. Studabaker, 133 Ind. 147	161, 271
Blaker v. State, 130 Ind. 205	75, 76	Brittain v. Crowther, 54 Fed. 295	416
Blanchard v. Bissell, 11 Ohio St. 96	569, 570	Britton v. State, ex rel., 115 Ind. 55.....	70
Blauvelt v. Smith, 22 N. J. Eq. 32	98	Broome v. Telegraph Co., 42 N. J. Eq. 141.....	138
Blizzard v. Blizzard, 48 Ind. 540	104	Brown v. Critchell, 110 Ind. 31	314, 342
Bloomfield R. R. Co. v. Bur- ress, 82 Ind. 83.....	449		

Brown v. Lynn, 31 Pa. St. 510	529	Carlson v. State, 145 Ind. 650. 51	
Brown v. McKay, 16 Ind. 484	278	Carmel, etc., Co. v. Small, 150 Ind. 427	204, 450
Brown v. Mitchell, 75 Tex. 9. 164		Carmichael v. Shiel, 21 Ind. 66	101
Brown v. Ogg, 85 Ind. 234... 59		Carmien v. Cornell, 148 Ind. 83	307
Brown v. State, 111 Ind. 442... 392		Carper v. Klitt, 71 Ind. 24... 680	
Brown v. Will, 103 Ind. 71... 396		Carriger v. Mackey, 15 Ind. App. 392	687
Bruce v. Schuyler, 4 Gilm. 221	230	Carrothers v. Carrothers, 107 Ind. 530	656
Bruger v. Kelsey, 72 Ind. 51... 416		Carver v. Carver, 44 Ind. 285. 564	
Brumfield v. Drock, 101 Ind. 190	342	Carver v. Howard, 92 Ind. 173	268
Bruner v. Brown, 139 Ind. 600	186, 191	Carver v. Louthain, 38 Ind. 530	390
Brunson v. Henry, 140 Ind. 455	314	Case v. State, ex rel., 69 Ind. 46	462, 463
Bucklew v. Central Iowa R. W. Co., 64 Iowa 603... 530		Casey v. Hulgán, 118 Ind. 590	11
Buffalo, etc., R. R. Co. v. Harvey, 107 Penn. 319... 146		Caskey v. City of Greens- burgh, 78 Ind. 233... 154, 430	
Building Ass'n v. Tel. Co., 88 Mo. 258	138	Cassady v. Miller, 106 Ind. 69	449
Bull v. Rothschild, 4 N. Y. . Supp. 826	8	Casto v. Evinger, 17 Ind. App. 298	586
Bumb v. Gard, 107 Ind. 575... 603		Cater v. Northwestern, etc., Co., 60 Minn. 539... 131, 134	
Bunting v. Gilmore, 124 Ind. 113	477	Catterlin v. City of Frank- fort, 87 Ind. 45... 153, 568, 571	
Burdge v. Bolln, 106 Ind. 175. 102		Caughman v. Drafts, 1 Rich. Eq. 414	388
Burdick v. Hunt, 43 Ind. 381. 104		Causidere v. Beers, 1 Abbott's App. Dec. 333... 343	
Burkam v. Burk, 96 Ind. 270. 365		Center Tp. v. Board, etc., 110 Ind. 579	102
Burkan v. McElfresh, 88 Ind. 223	104	Central Union Tel. Co. v. State, ex rel., 110 Ind. 203... 70	
Burnham v. Fisher, 25 Vt. 514	343	Chandler v. City of Kokomo, 187 Ind. 295... 568, 571, 573	
Burson v. Blair, 12 Ind. 371. 331		Chandler v. State, 141 Ind. 109	392
Burson v. Edwards, 1 Ind. 164	11	Chaplin v. Sullivan, 128 Ind. 50	477
Buser v. Shepard, 107 Ind. 424	408	Chapman v. Jones, 149 Ind. 434	347
Butler University v. Conard, 94 Ind. 353... 607		Chase v. Swain, 9 Cal. 130... 455	
Byram v. Galbraith, 75 Ind. 134	630	Cheesebrough v. Millard, 1 John Ch. 409... 477, 495	
Callen v. Junction City, 41 Kan. 466	570	Chesapeake, etc., Co. v. Mac- kenzie, 74 Md. 36... 139	
Callen v. Junction City, 43 Kan. 627	570	Chicago, etc., R. R. Co. v. Barnes, 2 Ind. App. 213... 102	
Campbell v. Board, etc., 115 Ind. 591	677	Chicago, etc., R. W. Co. v. Eggers, 147 Ind. 299... 483, 655	
Campbell v. People, 8 Wend. 636	354		
Campbell v. State, 148 Ind. 527	48, 50, 184		
Cargar v. Fee, 140 Ind. 572... 69			
Carlisle v. Morris, 8 Ind. 421. 690			

TABLE OF CASES CITED.

ix

Chicago, etc., R. W. Co. v. Galey, 141 Ind. 360.....	147	City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 246	554, 555
Chicago, etc., R. W. Co. v. Hall, 135 Ind. 91.....	148	City of Indianapolis v. Kingsbury, 101 Ind. 200.....	485
Chicago, etc., R. W. Co. v. Hunter, 128 Ind. 213.....	680	City of Indianapolis v. Patterson, 112 Ind. 344.....	569
Chicago, etc., R. R. Co. v. Ostrander, 116 Ind. 259....	658	City of Indianapolis v. Sturm, 39 Ind. 159.....	571
Chicago, etc., R. R. Co. v. Spilker, 134 Ind. 380.....	514	City of Joliet v. Seward, 86 Ill. 402	514, 525
Chicago, etc., R. W. Co. v. Whiting, etc., R. W. Co., 139 Ind. 297	130	City of Lafayette v. State, 69 Ind. 218	425
Choen v. State, 85 Ind. 209..	85	City of New Albany v. Endres, 143 Ind. 203.....	440
Chrisman v. Long, 1 Ind. 212.	476	City of New Albany v. Iron Substructure Co., 141 Ind. 500	564
Christy v. Holmes, 57 Ind. 314	702	City of Peru v. Bearss, 55 Ind. 576	574
Christy v. Smith, 80 Ind. 573.	411	City of Seward v. Conroy, 33 Neb. 430	570
Church v. Drummond, 7 Ind. 17	417	City of Shelbyville v. Phillips, 149 Ind. 552.....	371
Church v. Town of Knightstown, 35 Ind. 177.....	571	City of Terre Haute v. Beach, 96 Ind. 143.....	154
Cicero Township v. Picken, 122 Ind. 260.....	19	City of Terre Haute v. Evansville, etc., R. R. Co., 149 Ind. 174	154
Cincinnati, etc., R. W. Co. v. Butler, 103 Ind. 31.....	579	City of Vincennes v. Citizens', etc., Co., 132 Ind. 114.....	644
Cincinnati, etc., R. W. Co. v. Duncan, Admr., 143 Ind. 524	579	City of Wahoo v. Dickinson, 23 Neb. 426.....	570
Cincinnati, etc., R. W. Co. v. Gaines, 104 Ind. 526....	401, 403	City of Wahoo v. Tharp, 45 Neb. 563	570
Cincinnati, etc., R. W. Co. v. Howard, 124 Ind. 280.....	514	Clark v. Hillis, 134 Ind. 421..	451
Citizens National Bank v. Judy, 146 Ind. 322.....	496	Clawson v. Chicago, etc., R. W. Co., 95 Ind. 152.....	432
Citizens Nat'l Bank v. Vert, 26 Fed. 294.....	494	Claypool v. Gish, 108 Ind. 428.	96
Citizens' Street R. R. Co. v. Sutton, 148 Ind. 169....	215, 694	Clayton v. State, 100 Ind. 201.	85
City of Burlington v. Leebriek, 43 Iowa 252.....	570	Clayton, Admr., v. Blough, 93 Ind. 85	655
City of Cincinnati v. White, 6 Peters 431.....	550	Cleveland v. Obenchain, 107 Ind. 591	624
City of Columbus v. Strassner, 138 Ind. 301.....	518	Cleveland, etc., R. W. Co. v. Backus, 133 Ind. 513....	256, 632
City of Delphi v. Startzman, 104 Ind. 343.....	173	Cleveland, etc., R. W. Co. v. Moneyhun, 146 Ind. 147....	71
City of Emporia v. Smith, 42 Kans. 433	569	Clough v. Thomas, 53 Ind. 24.	332
City of Evansville v. Page, 23 Ind. 525	569	Clow v. Brown, 134 Ind. 287	186, 195
City of Galesburg v. Hawkinson, 75 Ill. 152.....	570	Cobble v. Tomlinson, 50 Ind. 550	312
City of Huntington v. Cast, 149 Ind. 255.....	204	Coffin v. Ransdell, 110 Ind. 417	192
City of Huntington v. Day, 55 Ind. 7	16	Cohen v. Wright, 22 Cal. 293.	618

Cole v. Malcolm, 66 N. Y. 363	477	Cox v. Hayes, 18 Ind. App. 220	442
Cole v. Temple, 142 Ind. 498.396		Craig v. Board of Medical Ex- aminers, 12 Mont. 203.....	616
Colee v. State, 75 Ind. 511....	564	Crake v. Crake, 18 Ind. 156....	330
Collier v. Collier, 150 Ind. 276.290		Cranford v. Tyrrell, 128 N. Y. 344	41
Collier v. Worth, L. R. 1 Exch. 464	354	Crawford v. Harvey, 1 Blackf. 382	382
Collins v. City of New Albany, 59 Ind. 396.....	569	Cray v. Philadelphia, etc., R. R. Co., 23 Blatchf. 263....	523
Columbian Athletic Club v. State, ex rel., 143 Ind. 98.36, 44		Creighton v. Piper, 14 Ind. 182	464
Commonwealth v. Erie, etc., R. R. Co., 27 Pa. St. 339.351, 352		Crippen v. Chappel, 35 Kan. 495	490
Commonwealth v. Getchell, 16 Pick. 452	387	Crooks v. Kennett, 111 Ind. 347	390
Commonwealth v. Harrington, 130 Mass. 35.....	654	Cross v. Herr, 96 Ind. 96....	630
Commonwealth v. Holley, 3 Gray 458	654	Crow v. Carver, 133 Ind. 260....	414
Commonwealth v. Miller, 8 Gray 484	654	Crowell v. Western Reserve Bank, 3 Ohio St. 406.....	308
Commonwealth v. Mott, 21 Pick. 492	294	Crowley v. Burlington, etc., R. W. Co., 65 Iowa 658.....	530
Commonwealth v. Pittsburgh, etc., R. R. Co., 24 Pa. St. 159	38, 39	Crumley v. Hickman, 92 Ind. 388	421
Commonwealth v. Wells, 110 Pa. St. 463.....	351	Crumlish, Admr., v. Central Impr. Co., 38 W. Va. 390....	477
Compton v. Pruitt, 88 Ind. 171	110, 113	Cully v. Shirk, 131 Ind. 76....	452
Cones, Admr., v. Cincinnati, etc., R. W. Co., 114 Ind. 328.579		Cummings v. Martin, 128 Ind. 20	588
Conger v. Miller, 104 Ind. 592	606	Cupp v. Campbell, 103 Ind. 213	396
Conkey v. Conder, 137 Ind. 441	184	Cutsinger v. Nebeker, 58 Ind. 401	317
Continental Ins. Co. v. Jach- nichen, 110 Ind. 59.....	417	Darkies v. Bellows, 94 Ind. 64	314
Conway v. Conway, 24 N. Y. Supp. 261	343	Darst v. Thomas, 87 Ill. 222....	478
Cook v. Frederick, 77 Ind. 406	308	Davenport v. Gwilliams, 133 Ind. 142	644
Coosaw Mining Co. v. South Carolina, 144 U. S. 566.....	41	Davenport v. McCole, 28 Ind. 495	313
Copeland v. City of St. Joseph, 126 Mo. 417.....	560	Davis v. Clark, 58 Kan. 454....	693
Copeland v. Summers, 138 Ind. 219	431, 469	Davis v. Clements, 148 Ind. 605	449
Corner v. Pendleton, 8 Md. 337	343	Davis v. Garr, 55 Am. Dec. 398	388
Cosby v. Powers, 137 Ind. 694	449, 452	Davis v. Schlemmer, Admr., 150 Ind. 472.....	493
Cottrell's Appeal, 23 Pa. St. 294	477	Davis v. State, ex rel., 44 Ind. 38	600
Cox v. Arnsmann, 76 Ind. 210.301		Davis v. Union Trust Co., 150 Ind. 46	107
Cox v. Dill, 85 Ind. 334.....	202	Dayton National Bank v. Mer- chants' National Bank, 37 Ohio St. 208.....	123
		Deal v. State, 140 Ind. 354.275, 702	

TABLE OF CASES CITED

xi

Dean v. State, 130 Ind. 241....	76	Drake v. State, 145 Ind. 210....	370
Dearmond v. Dearmond, 10 Ind. 191	67	Driscoll v. Commonwealth, 93 Ky. 393	616
Debolt v. Carter, 31 Ind. 355..	313	Drunfield v. Drook, 101 Ind. 190	314
Delhaney v. State, 115 Ind. 490	392	Dudley v. Pigg, 149 Ind. 363..	457
Deller v. Hofferberth, 127 Ind. 414	403	Durham v. Hall, 67 Ind. 123..	307
Den v. Du Bois, 16 N. J. L. 285	386	Durre v. Brown, 7 Ind. App. 127	455
Deniston v. Terry, 141 Ind. 677	240	Dusenbury v. Tel. Co., 11 Abb. Cases 440	138
Denney v. State, 144 Ind. 503..	250	Earle v. Earle, 91 Ind. 27....	451
Dent v. West Virginia, 129 U. S. 114	616, 619	Easley v. Missouri Pac. R. W. Co., 113 Mo. 236.....	547
Denton v. Ontario, etc., Bank, 28 N. Y. Supp. 293.....	594	Eastman v. State, 109 Ind. 278	616, 618
De Puy v. City of Wabash, 133 Ind. 336.....	451, 554	Edger v. Board, etc., 70 Ind. 331	33
De Pew v. Robinson, 95 Ind. 109	10	Edgeworth Co. v. Wetherbee, 72 Mass. 166.....	477
Derry v. Derry, 74 Ind. 560..	66	Edinburg American, etc., Co. v. Latham, 88 Ind. 88.....	496
Dessar v. Field, 99 Ind. 548..	285	Edmunds v. Gookins, 24 Ind. 169	569
Dessar v. King, 110 Ind. 69	475, 479	Eels v. American Tel., etc., Co., 143 N. Y. 133.....	139
Detroit City R. W. Co. v. Mills, 85 Mich. 634....	130, 131	Elchels v. Evansville Street R. W. Co., 78 Ind. 261.....	130
Detroit, etc., Ins. Co. v. Aspinall, 48 Mich. 238.....	496	Eller v. Crull, 112 Ind. 318....	415
Dill v. Voss, 94 Ind. 590.....	314	Elliott v. Gower, 12 R. I. 79..	486
Dillman v. Dillman, 90 Ind. 585	7, 96	Elliott v. Frakes, 71 Ind. 412..	110
Dillon v. Kauffman, 58 Tex. 696	494	Elliott v. Pontius, 136 Ind. 641	303, 307
Dinckerlocker v. Marsh, 75 Ind. 548	294	Elliott v. Russell, 92 Ind. 526..	417
District Attorney v. Lynn, etc., R. R. Co., 16 Gray 242..	40	Ellis v. Keller, 82 Ind. 524....	657
Dodge v. Freedman's Savings Co., 93 U. S. 379.....	477, 482	Ellsworth v. Lockwood, 42 N. Y. 89	477
Dodge v. Pope, 93 Ind. 480....	412	Elston v. Board of Trustees of Crawfordsville, 20 Ind. 272..	
Dodson v. Mayor, etc., 33 Ark. 508	570	.....	567, 569, 571
Doe v. Naylor, 2 Blackf. 32..	386	Engleman v. State, 2 Ind. 91..	76
Dogge v. State, 17 Neb. 140..	616	Engler v. Acker, 106 Ind. 223..	396
Dorrell v. Hannah, 80 Ind. 497	312	English v. Aldrich, 132 Ind. 500	16
Dorsey Machine Co. v. McCaffrey, 139 Ind. 545.....	157	Epps v. State, 102 Ind. 539..	85
Douglas v. County of Pike, 101 U. S. 677.....	174	Equitable Accident Ins. Co. v. Stout, 135 Ind. 444.....	99
Douglass v. State, 72 Ind. 385	564, 655	Erle, etc., R. R. Co. v. Casey, 26 Pa. St. 288.....	33
Douthit v. Douthit, 133 Ind. 26	656	Estate of Skerretts, 67 Cal. 585	469
Dowdy v. Blake, 50 Ark. 205..	493	Esty v. Graham, 46 N. H. 169..	122
Doyle v. McIntyre, 71 Ga. 673..	343	Evans v. Schafer, 38 Ind. 92..	104
		Evansville, etc., R. W. Co. v. Krapf, 143 Ind. 647.....	403

Evansville, etc., R. R. Co. v. Maddux, 134 Ind. 571...317, .....365, 412	Foreman v. Town of Mari- anna, 43 Ark. 324.....570
Exchange Bank v. Ault, 102 Ind. 322.....449, 451	Forgey v. First Nat'l Bank, 66 Ind. 123 .....655
Ex parte Frazer, 54 Cal. 94...616	Fort Wayne, etc., R. R. Co. v. Husselman, 65 Ind. 73.....702
Ex parte Ibbetson, 8 Ch. Div. 519 .....246	Forsyth v. Hammond, 166 U. S. 506 .....62
Ex parte Kiley, 135 Ind. 225.. 62	Forsythe v. City of Ham- mond, 68 Fed. 774.....570
Ex parte Maler, 103 Cal. 476.. 37	Forsythe v. City of Ham- mond, 142 Ind. 505, 572, 573, 575
Ex parte Spinney, 10 Nev. 323.617	Fossion v. Landry, 123 Ind. 136 .....93
Ex parte Sweeney, 126 Ind. 583 .....62	Fowler v. Aetna Fire Ins. Co., 6 Cow. 674.....417
Ex parte Yale, 24 Cal. 242....618	Fowler v. Wallace, 131 Ind. 347 .....559
Farm Land Co. v. Ellsbree, 55 Kan. 562.....496	Fox v. Territory, 2 Wash. T. 297 .....617
Farmers' Bank v. Butterfield, 100 Ind. 229.....90	France v. State (Ohio), 47 N. E. 1041 .....617
Farmers' Bank v. Erie R. R. Co., 72 N. Y. 188.....477	Franklin Life Ins. Co. v. Haz- zard, 41 Ind. 116.....247
Farrell v. Farrell, 3 Houst. (Del.) 633 .....683	Frazier's Admr. v. Beatty, 25 N. J. Eq. 343.....96
Farris v. Jones, 112 Ind. 498..7, 69	Freeman v. Sanderson, 123 Ind. 264 .....11
Fatman v. Leet, 41 Ind. 133..313	Frick v. Godare, 144 Ind. 170. 57
Faust v. City of Huntington, 91 Ind. 493.....550, 554	Fulh v. Beaver, 136 Ind. 319..102
Fay v. Lovejoy, 20 Wis. 403...388	Fuller v. Hollis, 57 Ala. 435..494
Felbleman v. State, ex rel., 98 Ind. 516.....650	
Fell v. Muller, 78 Ind. 507...432	
Field v. Holzman, 93 Ind. 205 .....307, 342	Gable v. Columbus Cigar Co., 140 Ind. 563.....414, 415
Fievel v. Zuber, 67 Tex. 275..494	Gage v. Censors, 63 N. H. 92..617
First Nat'l Bank v. Carter, 89 Ind. 317 .....102	Galentine v. Wood, 137 Ind. 532 .....96
First National Bank v. Par- sons, 128 Ind. 147.....313	Galloway v. Campbell, 142 Ind. 324 .....284
First National Bank of Mil- waukee v. Plankinton, 27 Wis. 177 .....388	Galvin v. State, 93 Ind. 550, 76, 85
First Nat'l Bank, etc., v. Root, 107 Ind. 228 .....435	Gambart v. Ball, 14 C. B. (N. S.) 306 .....354
First Nat'l Bank v. Union School Township, 75 Ind. 361 .....171	Gans v. Thleme, 93 N. Y. 225 .....493, 495, 496
Fischli v. Fischli, 1 Blackf. 360 .....325	Gardner v. Case, 111 Ind. 494.102
Fisher, Admr., v. Louisville, etc., R. W. Co., 146 Ind. 558.161	Garrigus v. Board, etc., 39 Ind. 66 .....423
Fitch v. Byall, 149 Ind. 554..451	Garvey v. Commonwealth, 8 Gray 382 .....654
Fletcher v. Crist, 139 Ind. 121.377	Gates v. Newman, 18 Ind. App. 392 .....60
Fletcher v. Oliver, 25 Ark. 289 .....242	Gates v. Tippecanoe Stone Co. (Ohio), 48 N. E. 285.....194
Flowers v. Brown, 21 Ill. 270. 98	Gauntlet, L. R. 4 P. C. 191...353
Forbes v. Meyers, 8 Blackf. 74 .....11	Gebhart v. Burkett, 57 Ind. 378 .....417
	Gee Wo v. State, 36 Neb. 241.616

TABLE OF CASES CITED.

xiii

Georgia R. R. Co. v. Carr, 73 Ga. 557	402	Hahn v. Behrman, 73 Ind. 120	594
Gerber v. Sharp, 72 Ind. 553.	475, 478	Hairgrove v. Millington, 8 Kan. 480	416
Gilbert v. Gilbert, 39 Iowa 657	496	Hall v. Durham, 116 Ind. 198.	455
Gilliam v. McCormack, 85 Tenn. 597	597	Hall v. Hall, 44 N. H. 293.	683
Glaze v. Citizens' National Bank, 116 Ind. 492.	328	Hall v. State, 8 Ind. 439.	76
Glover v. City of Terre Haute, 129 Ind. 593.	580	Hall v. State, 20 Ohio 8.	351, 352
Goben v. Goldsbury, 72 Ind. 44	107	Halley v. Gregg, 74 Iowa 563.	11
Goble v. Dillon, 86 Ind. 827.	60, 61, 62	Hamilton v. Amsden, 88 Ind. 304	221
Gold v. State, 143 Ind. 706.	171	Hamilton v. Byram, 122 Ind. 283	102
Goldthwaite v. City Council, 50 Ala. 486.	618	Hamrick v. Loring, 147 Ind. 229	215, 694
Good v. Golden, 73 Miss. 91.	494	Hance v. Hair, 25 Ohio St. 349	693
Goodnight v. Goar, 30 Ind. 418	305	Hancock v. Fleming, 85 Ind. 574	435
Gore v. Brian (N. J. Eq.), 85 Atl. 897	494	Hanlon v. Waterbury, 31 Ind. 168	111
Gosnell v. State, 52 Ark. 228.	617	Harbeck v. Vanderbilt, 20 N. Y. 395	481
Graham v. Selover, 59 Barb. 313	693	Hardenbrook v. Sherwood, 72 Ind. 403	474
Graves v. Ashford, L. R. 2. C. P. 410	354	Harding v. People, 10 Colo. 387	616
Gray v. Barton, 62 Mich. 186.	18	Hare v. Kennerly, 83 Ala. 608	239
Gray v. Obear, 54 Ga. 231.	386	Harley v. Helst, 86 Ind. 196.	247
Gray v. Palmer, 9 Cal. 616.	246	Harnsberger v. Yancey, 33 Gratt. (Va.) 527.	478
Greenwill v. Heritage, 71 Mo. 459	478	Harold v. State, 16 Texas App. 157	358
Gregory v. Van Voorst, 85 Ind. 106	101	Harper v. Fairley, 53 N. Y. 442	698
Greiner's Estate, 2 Watts (Pa.) 414	477	Harris v. Harris, 61 Ind. 117.	305, 314
Griebel v. State, ex rel., 111 Ind. 369	430	Harris v. Tomlinson, 130 Ind. 426	373
Griffin v. Kemp, 46 Ind. 172.	314	Harrison Nat'l Bank v. Culbertson, 147 Ind. 611.	96
Griffith v. Baltimore R. R. Co., 44 Fed. 574.	524	Harsh v. Kegley, 72 Ind. 398.	694
Grow v. Albee, 19 Vt. 540.	388	Harvey v. Krost, 16 Ind. 268.	268, 269
Gumberts v. Adams Express Co., 28 Ind. 181.	464	Haskell v. Blair, 3 Cush. 534.	247
Gunderson v. Richardson, 56 Ia. 58	417	Haskett v. Macey, 134 Ind. 182	173, 174
Gunter v. Fayetteville, 56 Ark. 202	570	Hastings v. Alken, 1 Gray 163	386
Gutzwiller v. Lackman, 23 Mo. 168	417	Hathaway v. Toledo, etc., R. W. Co., 46 Ind. 25.	579
Hadley v. Milligan, 100 Ind. 49	313	Havens, etc., Co. v. Harris, 140 Ind. 387.	813
Hagner v. Heyberger, 7 Watts & Serg. (Pa.) 104.	430, 431	Hawker v. People (U. S.), 18 Sup. Ct. Rep. 573.	621

Hawks v. Mayor, etc., 144 Ind. 343	90	Hoff's Appeal, 84 Pa. St. 42..	595
Haworth v. Montgomery, 91 Tenn. 16	617	Hogan v. Robinson, 94 Ind. 138	414, 416
Hayes v. Burkam, 67 Ind. 359.	166	Hohl v. Town of Westford, 33 Wis. 323.....	171
Hays v. City of Vincennes, 82 Ind. 178	150	Holbrook v. Holbrook, 1 Pick. 251	33
Hays v. Hostetter, 125 Ind. 60	285	Holcraft v. Mellott, 57 Ind. 539	385, 386
Hays v. Peck, 107 Ind. 389...	369	Holland Trust Co. v Waddell, 75 Hun 104.....	123
Hayward v. Kinney, 84 Mich. 591	98	Hollingsworth v. State, 111 Ind. 296	392
Hazelton v. De Priest, 143 Ind. 368	649	Hollingsworth v. Swendenborg, 49 Ind. 378.....	683
Head v. Doehleman, 148 Ind. 145	377	Holman v. State, ex rel., 105 Ind. 569	198
Headrick v. Brattain, 83 Ind. 188	314, 342	Holzman v. Hibben, 100 Ind. 338	314, 342
Heberd v. Wines, 105 Ind. 237.	390	Hon v. State, ex rel., 89 Ind. 249	440
Hedges v. Keller, 104 Ind. 479	102	Hooper v. Yonge, 69 Ala. 484.	98
Heininger v. Great Northern R. W. Co., 59 Minn. 458....	400	Hoover v. Epler, 52 Pa. St. 522 ...	477
Heiser v. Kelly, 73 Ind. 582..	312	Hopper v. Lucas, 86 Ind. 43..	330
Heller v. Clark, 103 Ind. 591.	96	Hormann v. Harmetz, 128 Ind. 353	655
Henderson v. Board, etc., 129 Ind. 92	677	Horner v. Savings Bank, 7 Conn. 478	122
Hendricks v. Gilchrist, 76 Ind. 369	430	Horn v. Eberhart, 17 Ind. 118.	630
Henning v. State, 106 Ind. 386	85	Hoy v. Bramhall, 19 N. J. Eq. 563	494
Henshaw v. Root, 60 Ind. 220.	308	Hudson v. Louisville, etc., R. Co., 14 Bush. (Ky.) 303..	402
Heritage v. Paine, 2 Ch. Div. 594	477	Huff v. City of Lafayette, 108 Ind. 14	154
Hershfield v. Rocky Mountain, etc., Co., 12 Mont. 102.	137	Huffmond v. Bence, 128 Ind. 131	478
Heuser v. Sharman, 89 Iowa 355	494	Hughes v. Done, 1 Q. B. 301..	83
Hewitt v. Charlier, 16 Pick. 353	616	Hughes v. Parker, 148 Ind. 692	63
Hewitt v. Tel. Co., 4 Mackey 424	138	Humphries v. Davis, 100 Ind. 274	233
Hicks v. State, 150 Ind. 293..	393, 700, 701	Hunsinger v. Hofer, 110 Ind. 390	416
Higgins v. Kendall, 73 Ind. 522	271	Hunt v. Elliott, 80 Ind. 245..	345
Hildreth v. Crawford, 65 Ia. 339	617	Hunt v. Lake Shore, etc., R. W. Co., 112 Ind. 69.....	34
Hilleman v. Hilleman, 85 Ind. 1	301	Hunter v. Robertson, 30 Ga. 479	698
Hillenberg v. Bennett, 88 Ind. 540	96	Hurla v. Kansas City, 46 Kan. 738	570
Hills v. Hills, 94 Ind. 436....	325	Hutchinson v. First National Bank, 133 Ind. 271.....	124
Hipes v. State, 18 Ind. App. 426	375	Hutchinson v. Lemcke, 107 Ind. 121	110
Hoagland v. State, 17 Ind. 488	359		

TABLE OF CASES CITED.

xv

Hutson v. Merrifield, 51 Ind. 24 .....219, 246	Johnson v. Gulf, etc., R. W. Co., 2 Tex. Civ. App. 139...525
Hyatt v. Cochran, 85 Ind. 231.314	Johnson v. Jouchert, 124 Ind. 105 .....485
Hyland, Auditor, v. Brazil Block Coal Co., 128 Ind. 335.221	Johnson v. Meeker, 1 Wis. 436 .....387
Ice v. Ball, 102 Ind. 46.....432	Johnson, Admr., v. Culver, Admr., 116 Ind. 278.....162
Indiana v. Kentucky, 136 U. S. 479 28	Johnston v. Griest, 85 Ind. 503 .....306
Indiana v. Woram, 6 Hill 33.. 28	Jones v. Broadhurst, 9 C. B. 193 .....477
Indiana, etc., R. W. Co. v. Adams, 112 Ind. 302.....101	Jones v. Cardwell, 98 Ind. 331.....342
Indiana etc., R. W. Co. v. Adamson, 114 Ind. 285.....309	Jones v. Jones, 91 Ind. 72...411
Indiana Racing Ass'n v. Allen, 140 Ind. 437.....656	Jones v. Robbins, 29 Me. 351.. 88
Indianapolis, etc., R. W. Co. v. Boettcher, 133 Ind. 82.401,402	Jones v. State,, 49 Ind. 549... 76
Indianapolis, etc., R. W. Co. v. Carr, 35 Ind. 510....529, 530	Jordan v. Chicago, etc., R. W. Co., 58 Minn. 8.....529
In re Denny, 2 Hill (N. Y.) 220 .....245	Joy v. St. Louis, 138 U. S. 1.. 44
In re Lloyd, 51 Kan. 501.... .....354, 355	Judd v. Martin, 97 Ind. 173..513
In re Pittsburgh, etc., R. W. Co., 147 Ind. 697..... 62	Julia Building Ass'n v. Bell Tel. Co., 88 Mo. 258.131, 135, 137
In re Roe Chung (N. M.), 49 Pac. 952 .....617	Kayser v. Trustees of Bre- men, 16 Mo. 881.....570
In re Smith, 10 Wend. (N. Y.) 449 .....617	Kean v. Roby, 145 Ind. 221...609
Iowa Eclectic Medical College v. Schrader, 87 Iowa 659...616	Kelser v. State, 78 Ind. 430...359
Irwin v. Great Southern Tel. Co., 37 La. Ann. 63.....137	Kelth v. Wilson, 145 Ind. 149.605
Irwin v. Lowe, 89 Ind. 540....423	Kelley v. Adams, 120 Ind. 840.342
Jacques v. Fackney, 64 Ill. 87 .....477	Kelley v. Love, 35 Ind. 106. .....331, 332
Jarboe v. Severin, 112 Ind. 572 .....101	Kellogg v. Chicago, etc., R. W. Co., 26 Wis. 223.....529
Jarrell v. Brubaker, 150 Ind. 260 .....656	Kelly v. Meeks, 87 Mo. 396...509
Jefferson School Township v. School Town of Worthing- ton, 5 Ind. App. 586.....170	Kendig v. Landis, 135 Pa. St. 612 .....594 595
Jenison v. Graves, 2 Blackf. 440 .....683	Kennedy v. Irwin, 25 Ind. 66.655
Jenkins v. Newman, 122 Ind. 99 .....452	Kent v. Taggart, 68 Ind. 163..608
Jenkins v. Rice, 84 Ind. 342..656	Kentucky, etc., Bridge Co. v. Hall, 125 Ind. 220.....528
Jenny Electric Co. v. Bran- ham, 145 Ind. 314.....628	Kern v. Isgrigg, 132 Ind. 4... 70
Jennings v. Durham, 101 Ind. 391 90	Kerr v. Lunsford, 31 W. Va. 659 .....164
Johns v. State, 104 Ind. 557..330	Kesler v. Myers, 41 Ind. 543..564
Johnson v. Barrett, 117 Ind. 551 .....496	Kessler, Tr., v. State, ex rel., 146 Ind. 221.....211, 212
	Ketcham v. Brazil, etc., Co., 88 Ind. 515..... 90
	Ketchner v. Forney, 29 Pa. St. 47 .....477
	Key v. Ostrander, 29 Ind. 1.. 57
	Killian v. State, ex rel., 15 Ind. App. 261.....171
	Kimball v. Loomis, 62 Ind. 201 .....564
	Kimble v. Seal, 92 Ind. 276..7, 8

Kincaid v. Indianapolis, etc., Co., 124 Ind. 577.....	133	Lewis v. Stanley, 148 Ind. 351	301
Kinnaman v. Pyle, 44 Ind. 275	485	Lindsay v. Lindsay, 47 Ind. 283	386
Kinsey v. State, ex rel., 98 Ind. 351	101	Lippperd v. Edwards, 39 Ind. 165	305
Klipper v. Glancey, 2 Blackf. 356	307	Lockhart v. Craig Street R. W. Co., 139 Penn. 419.....	130
Kirk v. Hiatt, 2 Ind. 322.....	692	Lockwood v. Dills, 74 Ind. 56.101	
Kissel v. Eaton, 64 Ind. 248..	408	Logan v. State, 5 Tex. App. 306	617
Kizer v. Town of Winchester, 141 Ind. 694.....	554	Long v. Ruch, 148 Ind. 74....	452
Knight v. Houghtalling, 94 N. C. 411	98	Longworth's Executors v. Common Council of Evans- ville, 32 Ind. 322.....	571
Koerner v. State, ex rel., 148 Ind. 158	696	Louisville, etc., R. W. Co. v. Bates, 146 Ind. 564.160, 161, 403	
Koons v. Mellett, 121 Ind. 585. 96		Louisville, etc., R. W. Co. v. Boland, 70 Ind. 595.....	107
Krouskop v. Shontz, 51 Wis. 204	486	Louisville, etc., R. W. Co. v. Downey, 18 Ind. App. 140....	442
Krug v. Davis, 85 Ind. 309....	449	Louisville, etc., R. W. Co. v. Etzler, 4 Ind., App. 31.....	96
Kurtz v. Carr, 105 Ind. 574....	102	Louisville, etc., R. W. Co. v. Falvey, 104 Ind. 409.....	390
Kyner v. Kyner, 6 Watts (Pa.) 221	478	Louisville, etc., R. W. Co. v. Frawley, 110 Ind. 18..162, 165	
Lacy v. Brown, 67 Ind. 478..	382, 388	Louisville, etc., R. W. Co. v. Goodykoontz, 119 Ind. 111..	71
Lake Erie, etc., R. W. Co. v. Griffin, 107 Ind. 464....	102, 146	Louisville, etc., R. W. Co. v. Green, 120 Ind. 367.....	630
Lake Erie, etc., R. R. Co. v. Priest, 131 Ind. 413.....	342	Louisville, etc., R. W. Co. v. Hart, 119 Ind. 273.....	162
Lake Erie, etc., R. R. Co. v. Stick, 143 Ind. 449.....	179, 182	Louisville, etc., R. W. Co. v. Jones, 108 Ind. 551.....	403
Lake Shore, etc., R. W. Co. v. Kurtz, 10 Ind. App. 60....	347	Louisville, etc., R. W. Co. v. Lynch, 147 Ind. 165.....	162
Lake Shore, etc., R. W. Co. v. Van Auken, 1 Ind. App. 492	102	Louisville, etc., R. W. Co. v. Miller, 141 Ind. 533.....	373
Lamb v. Lamb, 105 Ind. 456..	630	Louisville, etc., R. W. Co. v. Schmidt, 134 Ind. 16....	400, 402
Lamb v. Old Colony R. R. Co., 140 Mass. 79.....	400	Louisville, etc., R. R. Co. v. Schmidt, 147 Ind. 638.....	668
Lammert v. Lidwell, 62 Mo. 188	570	Louisville, etc., R. W. Co. v. Thompson, 107 Ind. 442.345, 630	
Langan v. St. Louis, etc., R. W. Co., 72 Mo. 392.....	529	Luntz v. Greve, 102 Ind. 173..	485
Lantz v. Maffett, 102 Ind. 23..	603	Lyon's Case, Bell's C. C. 45..	352
Lapping v. Duffy, 47 Ind. 51..	331	Madison, etc., R. R. Co. v. Whiteneck, 8 Ind. 217.....	101
Lawrence v. Van Buskirk, 140 Ind. 481	398, 627, 628	Maguire v. State, 47 Md. 485.654	
Lee v. Basey, 85 Ind. 543.....	455	Makepeace v. Bronnenberg, 146 Ind. 243.....	668
Lee v. Sturges, 46 Ohio St. 153	250	Mann v. Belt R. R., etc., Co., 128 Ind. 138.....	579
Leschen v. Guy, 149 Ind. 17..	396	Manns Bros. Boot, etc., Co. v. Templeton, 149 Ind. 706....	51
Leverich v. State, 105 Ind. 277	392		
Levering v. Shockey, 100 Ind. 558	369		
Lewis v. Palmer, 28 N. Y. 271.	478		

TABLE OF CASES CITED.

xyii

Maple v. Beach, 43 Ind. 51...	313	McKesson v. Stanton, 50 Wis.	
Marienthal v. Mosler, 16 Ohio		297	496
St. 566	693	McLaren v. McMartin, 36 N.	
Martin v. Davis, 82 Ind. 41...		Y. 88	693
.....	305, 314	McNutt v. McNutt, 116 Ind.	
Martin v. Martin, 74 Ind. 207		545	642, 643, 655
.....	655	Mechanic's Bank v. Seitz, 30	
Martin v. Murphy, 129 Ind.		W. N. Cas. 261.....	476
464	430	Mercer v. Corbin, 117 Ind. 450	
Martin v. Quinn, 37 Cal. 55...	477	.....	354, 357
Mason v. Waite, 17 Mass. 560		Merchants, etc., Assn. v. Scan-	
.....	343	lan, 144 Ind. 11.....	396
Mathews v. Aiken, 1 N. Y.		Meredith v. State, 122 Ind.	
595	478, 481	514	392
Mathews v. Droud, 114 Ind.		Merrill v. Marshall County,	
268	390	74 Iowa 24.....	171
Mathewson v. Phoenix Iron		Merritt v. Richey, 97 Ind. 236	
Foundry, 20 Fed. 231.....	386	.....	594
Matthews v. Pate, 93 Ind. 443		Merritt v. Straw, 6 Ind. App.	
.....	110	360	96
Maxwell v. Boyne, 36 Ind.		Mescal v. Tully, 91 Ind. 96..	
120	10	.....	301, 431
Maxwell v. Vaught, 96 Ind.		Meyers v. Bohliffing, 44 Ind.	
136	101	238	11
May v. Hoover, 112 Ind. 455		Michigan Life Ins. Co. v.	
.....	34, 96, 233	Frankel (Ind. Sup.), 50 N.	
Mayor, etc., v. Green, 1 Hilt.		E. 304	703
(N. Y.) 393.....	455	Middleton v. Greeson, 106 Ind.	
Mayor, etc., v. Weema, 5 Ind.		18	233
547.....	259, 569, 571	Midland R. W. Co. v. Galey,	
McAllister v. Oberne, 42 Ill.		141 Ind. 483	146
App. 287.....	343	Miles v. Ray, 100 Ind. 163.....	423
McClure v. Andrews, 68 Ind.		Millholland v. Tiffany, 64 Md.	
97	476	455	496
McCormick v. District of Co-		Miller v. Bottenburg, 144 Ind.	
lumbia, 4 Mackey 396.....	137	312	347
McCormick v. Spencer, 53 Ind.		Miller v. Evansville, etc., R.	
550	655	R. Co., 143 Ind. 570....	184, 370
McCoy v. Barns, 136 Ind. 378.	588	Miller v. Ewer, 27 Me. 509...	480
McCrory v. Little, 136 Ind.		Miller v. Louisville, etc., R.	
86	102	W. Co., 128 Ind. 97.....	525
McEnaney v. Town of Sulli-		Miller v. Shields, 124 Ind.	
van, 125 Ind. 407.....	554	166	588
McFadden v. Wilson, 96 Ind.		Miller v. State, 149 Ind. 607	
253	343	.....	274, 298, 394, 696, 697
McFarland v. Birdsall, 14 Ind.		Miller v. Winchell, 70 N. Y.	
126	285	437	478
McGee v. State, ex rel., 103		Millner v. Millner, 2 Edwards	
Ind. 444	362	Ch. 114	8
McGinnis v. Boyd, 144 Ind.		Mills v. Armstrong, 13 App.	
393	90	Cas. 1	525
M'Glemery v. Keller, 3 Blackf.		Mills v. Winter, 94 Ind. 329.	344
488	11	Minster v. Citizens R. W. Co.,	
M'Hatton v. Bates, 4 Blackf.		53 Mo. App. 276.....	514, 523
63	342	Mitchell v. Butt, 45 Ga. 162..	494
McIntire v. Young, 6 Blackf.		Mode v. Beasley, 143 Ind. 306.	234
496	11		

Morrison v. Kramer, 58 Ind. 38	313	Niles v. Dodge, 70 Ind. 147. .	199
Morse v. Morse, 25 Ind. 156. .	327	Noe v. Roll, 134 Ind. 115.	301
Mosler's Appeal, 56 Pa. St. 70.	477	North v. State, ex rel., 107 Ind. 356.	430, 439
Mowbray v. State, ex rel., 88 Ind. 324	462	Northwestern, etc., Ins. Co. v. Blankenship, 94 Ind. 535. .	630
Muckenberq v. Holler, 29 Ind. 139	325	Norton v. Eastern R. R. Co., 113 Mass. 366.	400
Mullen v. People, 31 Ill. 444. .	294	Norton v. State, 106 Ind. 163. 85	
Mullikin v. City of Bloomington, 72 Ind. 161.	430, 569	Nowlin v. Whipple, 120 Ind. 596	552
Murphy v. State, 97 Ind. 579. 85		Ogden v. Totten (Ky.), 34 S. W. 1081.	496
Musselman v. Manly, 42 Ind. 462	7, 8, 9	Ohio, etc., R. W. Co. v. Cosby, 107 Ind. 32.	342
Musselman v. McElhenny, 23 Ind. 4	382, 384	Ohio, etc., R. W. Co. v. Trowbridge, 126 Ind. 391.	400
Nash v. Berkmeir, 83 Ind. 536	485, 486	Ohio, etc., R. W. C. v. Walker, 113 Ind. 196.	403
Nash v. Taylor, 83 Ind. 347. .	476	Omaha, etc., R. W. Co. v. Clark, 35 Neb. 867.	402
Nashville, etc., R. W. Co. v. M'Connell, 82 Fed. 76.	44	Omaha, etc., R. W. Co. v. Talbot, 48 Neb. 627	526
National Bank v. Cushing, 53 Vt. 321	494	Ominger v. New York Central R. R. Co., 4 Hun 159. .	530
National State Bank v. Vigo County National Bank, 141 Ind. 352	124, 125	Osborne v. State, ex rel., 128 Ind. 129	462
Nave v. Hadley, 74 Ind. 155	314, 341	Oury v. Saunders, 77 Tex. 278	494
Neal v. State, 49 Ind. 51. . .	314	Owen v. Cook, 3 Tenn. Ch. 78. .	494
Needham v. Wright, 140 Ind. 190	312	Pacific Cable Co. v. Irvine, 49 Fed. 113	139
Neisler v. Harris, 115 Ind. 560. .	402	Palmer v. Lord, 6 Johns Ch. 95	382, 388
Nelson v. Johnson, 18 Ind. 329	332	Palmerton v. Hoop, 131 Ind. 23	451
Nesbit v. Town of Garner, 75 Ia. 314	514, 525, 527	Pape v. Wright, 116 Ind. 502. .	390
New Albany, etc., R. R. Co. v. Huff, 19 Ind. 444.	285	Parker v. Small, 58 Ind. 349. .	314
New York, etc., R. R. Co. v. Hamlet Hay Co., 149 Ind. 344	271	Parker v. State, ex rel., 133 Ind. 200	462, 463
New York, etc., R. R. Co. v. Hammond, 132 Ind. 475. .	147	Parker v. State, 136 Ind. 284. .	276
New York Life Ins. Co. v. Statham, 93 U. S. 24.	240	Parvin v. Wimberg, 130 Ind. 561	233
Nichols v. Bellows, 22 Vt. 581. .	382	Patten v. Stewart, 24 Ind. 332	7, 8, 9
Nichols, etc., Co. v. Burch, 128 Ind. 324	370	Patton v. Loughridge, 49 Iowa 218	325
Nicholson v. Fields, 31 L. J. Ex. 235	352	Paul v. Town of Walkerton, 150 Ind. 565.	703
Nicholson v. Nicholson, 113 Ind. 131	325	Payne v. Baxter, 2 Tenn. Ch. 518	96
Nicklaus v. Dahn, 63 Ind. 87. .	312	Payne v. Hathaway, 3 Vt. 212	477, 494
Nicodemus v. Simons, 121 Ind. 567	315	Pearcy v. Henley, 82 Ind. 129. .	485
		Peck v. Mallams, 10 N. Y. 509. .	57

TABLE OF CASES CITED.

xix

Pelham v. Newcastle, 3	Philanthropic Building Ass'n
Swanet, 289 96	v. McKnight, 35 Pa. St. 470. 388
Pence v. Armstrong, 95 Ind.	Phillips v. State, 108 Ind. 406. 85
191 268, 475	Pickett v. Green, 120 Ind. 584
Pence v. Garrison, 98 Ind. 345	..... 370
..... 90	Pierce v. Drew, 136 Mass. 75
Pence v. Waugh, 135 Ind. 143	..... 135, 136, 138
..... 166, 167	Pierson v. Fuhrman, 1 Colo.
Pennsylvania Co. v. Dolan, 6	App. 187 343
Ind. App. 109 370	Pinch v. Anthony, 10 Allen
Pennsylvania Co. v. Platz, 125	470 8
Ind. 26 552	Pittsburg, etc., R. W. Co. v.
Pennsylvania Co. v. Sedwick,	Hixon, 110 Ind. 227 403
59 Ind. 336 317	Pittsburgh, etc., R. W. Co. v.
People v. Blue Mountain Joe,	Noftsgcr, 148 Ind. 101 551
129 Ill. 370 616	Pittsburg, etc., R. W. Co. v.
People v. City of St. Louis,	O'Brien, 142 Ind. 218 606
10 Ill. 351 38	Pixley v. Van Nostern, 100
People v. Eaton, 100 Mich.	Ind. 34 345
208 135, 137	Platter v. City of Seymour, 86
People v. Elk River, etc., Co.,	Ind. 323 308, 431
107 Cal. 219 38	Plaut v. Storey, 131 Ind. 46. 485
People v. Fulda, 52 Hun 65. 617	Plumbly v. Commonwealth,
291 617	2 Metc. (Mass.) 413 654
People v. Moorman, 86 Mich.	Port of Mobile v. Louisville,
433 617	etc., R. R. Co., 84 Ala. 115. 41
People v. Morris, 13 Wendell	Porter v. Seller, 23 Penn. St.
325 176	424 417
People v. Phippin, 70 Mich.	Post v. Pearsall, 22 Wend.
6 616	444 549
People v. Tioga, 19 Wend. (N.	Poudre v. Tate, 132 Ind. 327. 7
Y.) 75 245	Powers v. State, 87 Ind. 144. 85
People v. Truckee Lumber	Prescott v. Fisher, 22 Ill. 390. 325
Co., 116 Cal. 397 38	Pruitt v. Farber, 147 Ind. 1. 48
People v. Vanderbilt, 26 N.	Puterbaugh v. Reasor, 9 Ohio
Y. 287 40	St. 484 514, 524
People v. Warden, 144 N. Y.	Putt v. Putt, 149 Ind. 30. 365
529 618	
People's Bank v. National	Quick v. Brenner, 101 Ind.
Bank, 101 U. S. 181. 125, 126	230 102
People's Gas Co. v. Tyner, 131	Quick v. Springfield Town-
Ind. 281 30, 35, 44	ship, 7 Ind. 636 600
Pepper v. Zahnsinger, 94 Ind.	Quick v. Whitewater Town-
88 110, 111	ship, 7 Ind. 570 600
Pery v. Lansing, 17 Hun 34. 523	
Peru, etc., R. R. Co. v. Has-	Ragsdale v. Barnett, 10 Ind.
ket, 10 Ind. 409 400	App. 478 644
Peterborough Savings Bank v.	Rains v. State, 137 Ind. 83. 274
Hodgdon, 62 N. H. 300. 388	Ramsdell v. Maxwell, 32 Mich.
Peters v. Banta, 120 Ind. 416. 290	285 98
Peters v. Guthrie, 119 Ind. 44	Rand v. Commonwealth, 9
..... 314, 342	Grat. (Va.) 738 654
Peyton v. Kruger, 77 Ind. 486. 308	Randolph v. O'Riordon, 155
Praff v. Terre Haute, etc., R.	Mass. 331 525
R. Co., 108 Ind. 144. 221	Rardin v. Walpole, 38 Ind. 146
Pfister v. Gerwig, 122 Ind.	..... 477, 655
567 342	

Rauch v. Commonwealth, 78 Pa. St. 490	654	Robinson v. Snyder, 74 Ind. 110	101
Rawlings v. Fuller, 31 Ind. 255	345	Rodefer v. Fletcher, 89 Ind. 563	411
Rawson v. Pratt, 91 Ind. 9...432		Rodgers v. Baltimore, etc., R. W. Co., 150 Ind. 398.....	199
Raymond v. Wathen, 142 Ind. 367	163	Rogers v. Goodwin, 2 Mass. 475	230
Receivers of New Jersey, etc., R. W. Co. v. Wortendyke, 27 N. J. Eq. 658.....	494	Rogers v. Lamb, 3 Blackf. 155	417
Redington v. Cornwell, 90 Cal. 49	478	Rogers v. Leyden, 127 Ind. 50	522
Reeves, Admr., v. Isenhour, 59 Ind. 478.....	476, 493	Rogers v. Union Life Ins. Co., 111 Ind. 343.....	587
Reg. v. Smith, L. R. 1 Crown Cas. 266	351	Rooker v. Benson, 83 Ind. 250.478	
Reid v. Ross, 15 Ind. 265...331		Rose v. Rose, 98 Ind. 179...825	
Reimler v. Pfingsten (Md.), 28 Atl. 24	494	Ross v. Banta, 140 Ind. 120.442	
Reinhold v. State, 130 Ind. 472	392	Rowe v. Peabody, 102 Ind. 198	346
Reissler v. Dessar, 80 Ind. 307.....	474, 475, 478	Roys v. Vilas, 18 Wis. 179.312	
Relender v. State, ex rel., 149 Ind. 283.....	462, 464	Ruddick's Admr. v. Ruddick's Admr., 21 Ind. 163.....	694
Reniham v. Wright, 125 Ind. 536	342	Ruffing v. Tilton, 12 Ind. 259.307	
Rex v. Hodnett, 1 T. R. 101.353		Russ v. Russ, 142 Ind. 474...561	
Reynolds v. State, 147 Ind. 12	392	Russell v. Senior, 118 Ind. 520	624
Reynolds v. State, ex rel., 61 Ind. 392.....	464	Ryman v. Crawford, 86 Ind. 262	166
Rhodes v. Green, 36 Ind. 7...415		Salem-Bedford Stone Co. v. O'Brien, 12 Ind. App. 217...657	
Richardson v. Dorman's Executrix, 28 Ala. 679.....	617	Sample v. Cochran, 84 Ind. 594	492, 496
Richardson v. Schultz, 98 Ind. 429	66	Sanborn v. French, 2 Foster 246	486
Richardson v. State, 47 Ark. 562	617	Sanders v. Loy, 45 Ind. 229...694	
Richwine v. Presbyterian Church, 135 Ind. 80.....	93, 607	Sanders v. State, 85 Ind. 318. 17	
Riggs v. Riley, 113 Ind. 208.624		Sanford v. McLean, 3 Page 116	494
Riley v. Western Union Tel. Co., 47 Ind. 511.....	220, 224, 235, 250	Sanxay v. Hunger, 42 Ind. 44.655	
Robbins v. Magee, 76 Ind. 861.173		Saunders, Treas., v. Montgomery, 143 Ind. 185.....	627
Robbins v. Masteller, 147 Ind. 122	290	Scanlin v. Stewart, 138 Ind. 574	442
Roberts v. Farmers & Merchants Bank, 136 Ind. 164.....	414	Schee v. Wiseman, 79 Ind. 389	314, 341
Roberts v. Lindley, 121 Ind. 56	110	Schenck v. Conover, 13 N. J. Eq. 220.....	98
Robertson v. Van Cleve, 129 Ind. 217	266	School City of South Bend v. Jacquith, Tr., 90 Ind. 495..	171, 172
Robinson v. City of Valparaiso, 136 Ind. 616.....	554	Schoonover v. Rowe, 7 Blackf. 202	11
		Schroeppel v. Corning, 5 Denio 236	388
		Scobey v. Kinningham, 131 Ind. 552	268
		Scott v. Leary, 34 Md. 389....	388

TABLE OF CASES CITED.

xxi

Scott v. Morris, 9 Serg. & R. (Pa.) 123	246	Simpson v. Eggington, 10 Exch. 845	477
Second National Bank v. Corey, 94 Ind. 457.....	606	Sims v. City of Frankfort, 79 Ind. 446	480
Security Co. v. Arbuckle, 119 Ind. 69	588	Singer v. State, 72 Md. 464...	618
Sedwick v. Ritter, 128 Ind. 209	314	Sinn v. King, 131 Ind. 183....	624
Senour v. Ruth, 140 Ind. 318	221, 241	Skinner v. Terry, 107 N. C. 103	455
Shaffer v. Matthews, 77 Ind. 83	643	Slagle v. Hoover, 137 Ind. 314.	414
Shane v. Francis, 30 Ind. 92..	341	Sloan v. New York, etc., R. R. Co., 45 N. Y. 125	167
Shannon v. Hay, 106 Ind. 589. 58		Smathers v. State, 46 Ind. 447. 76	
Sharp v. Carter, 3 P. Wms. 375	96	Smead v. Green, 5 Ind. 308. . .	382, 388
Shattuck v. Cox, 128 Ind. 293.	493	Smets v. Plunket, 1 Strob. (S. C.) 372	417
Shearman v. Jorgensen, 106 Cal. 483	455	Smith v. Alabama, 124 U. S. 465	618
Shears v. State, 147 Ind. 51. .	276	Smith v. Bank of the State, 18 Ind. 327	490
Shelby Township v. Randles, 57 Ind. 390	171	Smith v. Coon, 22 La. Ann. 445	693
Sheldon v. Clark, 1 Johns 513.	617	Smith v. Foran, 43 Conn. 244.	478
Shellhouse v. State, 110 Ind. 509	547	Smith v. Goodknight, 121 Ind. 312	430
Shepard v. Goben, 142 Ind. 318	292	Smith v. Hoyt, 14 Wis. 272. .	387
Shepherd v. Evans, 9 Ind. 260. 71		Smith v. McClain, 146 Ind. 77.	370
Sherry v. Denn, 8 Blackf. 542.	603	Smith v. State, 58 Ind. 340. .	76
Shew v. Hews, 126 Ind. 474	414, 435	Smith v. State, ex rel., 140 Ind. 343	430
Shinn v. Budd, 14 N. J. Eq. 234	494	Smith v. Wabash R. R. Co., 141 Ind. 92	579
Shirk v. Moore, 96 Ind. 199. .	421	Smith, Tr., v. Wells Mfg. Co., 148 Ind. 333.	125, 442
Shirts v. Irons, 28 Ind. 458. . .	476, 493	Smock v. Brush, 62 Ind. 156. .	345
Shobe v. Brinson, 148 Ind. 235.	112	Smock v. Reichwine, 117 Ind. 194	111
Shockney v. Smiley, 13 Ind. App. 181	330	Smurr v. State, 88 Ind. 504. .	653
Shoemaker v. Benedict, 11 N. Y. 176	693	Snideman v. Snideman, 118 Ind. 162	390
Shoemaker v. Board, etc., 36 Ind. 175	345	Snow v. Housatonic R. R. Co., 8 Allen 441.	530
Shoemaker v. Smith, 100 Ind. 40	102	Spaulding v. Alford, 1 Pick. 33	617
Shoemaker v. South Bend, etc., Co., 135 Ind. 471.	554	Spaulding v. Harvey, 129 Ind. 106	478, 496
Shoner v. Pennsylvania Company, 130 Ind. 170.	528	Spencer v. Board, etc., 117 Ind. 573	390
Shorb v. Brubaker, 94 Ind. 165	166	Springer v. Byram, 137 Ind. 15	512, 532
Short v. State, 63 Ind. 376. .	85	Stalcup v. Dixon, 136 Ind. 9. .	656
Sibert v. Copeland, 146 Ind. 387	585	Stanley v. Sullivan, 71 Wis. 585	96, 98
Sidener v. Pavay, 77 Ind. 241	477, 478, 496	State v. Adams, 64 N. H. 440.	654
Siebert v. State, 95 Ind. 471. .	653	State v. Adams Express Co., 144 Ind. 549	28
Sim v. Hurst, 44 Ind. 579. . .	314	State v. Arlin, 39 N. H. 179. .	294
Simmons v. Beazel, 125 Ind. 362	96	State v. Becton, 7 Baxter 138.	354
		State v. Bowman, 103 Ind. 69. .	85

State v. Buskirk, 18 Ind. App. 629	354	State v. Union Nat'l Bank of Muncie, 145 Ind. 537.....	28
State v. Call (N. C.), 28 S. E. 517	617	State v. Vandersluis, 42 Minn. 129	617
State v. Carey, 4 Wash. 424....	617	State v. Van Doran, 109 N. C. 864	617
State v. Chicago, etc., R. R. Co., 145 Ind. 229.....	28	State v. Vogel, 117 Ind. 188....	442
State v. City of Indianapolis, 69 Ind. 375.....	240	State Bank v. Ensminger, 7 Blackf. 105....	382, 384, 387, 388
State v. Cornel, 31 N. J. L. 374	222	State, ex rel., v. Adams, 65 Ind. 393	430
State v. Crawford, 28 Kansas 726	37	State, ex rel., v. Beck, 81 Ind. 500	430
State v. Creditor, 44 Kan. 565	617	State, ex rel., v. Bieler, 87 Ind. 327	464
State v. Daniel (Wash.), 49 Pac. 243	258	State, ex rel., v. Crawfordsville, etc., Turnpike Co., 102 Ind. 283	102
State v. Dent, 25 W. Va. 1....	616	State, ex rel., v. Emmons, 99 Ind. 452	101
State v. District Court, 13 Mont. 370	616	State, ex rel., v. Foulkes, 94 Ind. 493	308
State v. Donaldson, 41 Minn. 74	617	State, ex rel., v. Gallagher, 81 Ind. 558	430
State v. Fleischer, 41 Minn. 69	616	State, ex rel., v. Gorby, 122 Ind. 17	464
State v. Flemons, 6 Ind. 279....	101	State, ex rel., v. Halter, 149 Ind. 292	457
State v. Forcier, 65 N. H. 42....	617	State, ex rel., v. Harper, 120 Ind. 23	414
State v. Fussell, 45 Ark. 65....	617	State, ex rel., v. Illyes, 87 Ind. 405	221
State v. Gazlay, 5 Ohio 14....	618	State, ex rel., v. Krug, 94 Ind. 366	272
State v. Gorham, 65 Me. 270....	654	State, ex rel., v. Long, 91 Ind. 351	464
State v. Hays, 78 Mo. 600....	354, 355	State, ex rel., v. McClelland, Tr., 138 Ind. 395	600
State v. Hunt, 137 Ind. 551....	301	State, ex rel., v. Parrish, 1 Ind. App. 441	325
State v. Jones, 19 Ind. 356....	425	State, ex rel., v. Peterson, 74 Ind. 174	430
State v. Kidd, 74 Ind. 554. 354, 356		State, ex rel., v. Shay, 101 Ind. 86	430
State v. Matthews, 129 Ind. 281	313	State, ex rel., v. Town of Tipton, 109 Ind. 73.....	430
State v. Metschan (Or.), 46 Pac. 791	38	State, ex rel., v. Vogel, 117 Ind. 188	102
State v. Mosher, 78 Iowa 321. 616		State, ex rel., v. Weatherby, 45 Mo. 17	570
State v. Ohio Oil Co., 150 Ind. 21	695, 698	State, ex rel., v. Wilcox, 45 Mo. 458	570
State v. Portsmouth Savings Bank, 106 Ind. 435.....	28	State, ex rel., v. Wilson, 90 Ind. 114	83
State v. Randolph, 23 Or. 74....	617	Stayner v. Joyce, 120 Ind. 99. 162	
State v. Rodman, 58 Minn. 393	31	Stearns v. Bates, 46 Conn. 306	122
State v. Rollins, 8 N. H. 550....	386		
State v. Simons, 32 Minn. 540. 570			
State v. Springfield Township, 6 Ind. 83	600		
State v. State Board of Health, 103 Mo. 22.....	617		
State v. State Board of Medical Examiners, 34 Minn. 387. 616			
State v. State Medical Examining Board, 32 Minn. 324....	616		
State v. Tucker, 32 Mo. App. 620	425		

TABLE OF CASES CITED.

xxiii

Stebbins v. Willard, 53 Vt. 685 .....494	Taylor v. Goodwin, 4 Q. B. Div. 228 .....354, 355
Steele v. City of Newton, 41 Kans. 512 .....570	Teegarden v. Lewis, 145 Ind. 98 .....161, 165
Steele v. McCarty, 130 Ind. 547 .....416	Tel. Co. v. Barnett, 107 Ill. 507 .....138
Steele v. Souder, 20 Kans. 39. 693	Tel. Co. v. Lead Co., 50 N. Y. Supr. Ct. 488.....128
Stephenson v. Boody, 139 Ind. 60 .....174	Terre Haute, etc., R. R. Co. v. McCorkle, 140 Ind. 613. 435
Stevens v. Goodenough, 26 Vt. 676 .....478	Terry v. Shively, 93 Ind. 413. .....271, 655
Stewart v. Babbs, 120 Ind. 568 .....585	Teter v. Clayton, 71 Ind. 237.....386, 387
Stilz v. City of Indianapolis, 55 Ind. 515.....153, 569	Tewksbury v. Howard, 138 Ind. 103 .....403
Storms v. Stevens, 104 Ind. 46 .....259	Thames, etc., Co. v. Beville, 100 Ind. 309 .....104
Stout v. Board, etc., 107 Ind. 343 .....34, 259	Thatcher v. Humble, 67 Ind. 444 .....430
Stout v. Curry, 110 Ind. 514. .....271, 655	Thomas v. De Baum, 14 N. J. Eq. 37 .....98
Stowell v. Hazelett, 66 N. Y. 635 .....416	Thomas v. Irwin, 90 Ind. 557. .....314, 342
Stowers v. Postal Telegraph Cable Co., 68 Miss. 559....138	Thomas v. Shoemaker, 6 W. & S. (Pa.) 179.....388
Stratton v. Allen, 16 N. J. Eq. 229 .....18	Thomas v. Thompson, 149 Ind. 391 .....603
Strong v. State, 1 Blackf. 193. 294	Thompson v. Bowle, 4 Wall. 471 .....417
Strong v. State, 105 Ind. 1... 85	Thompson v. Connecticut Ins. Co., 135 Ind. 325.....496
Strong v. Taylor School Tp., 79 Ind. 208.....307	Thompson v. Harlow, 150 Ind. 450 .....449, 554
Strosser v. City of Ft. Wayne, 100 Ind. 443.....569	Thompson v. Hazen, 25 Me. 104 .....617
Stroup v. Stroup, 140 Ind. 179. 469	Thompson v. Kreisher, 148 Ind. 573 .....607
Stultz v. Stultz, 107 Ind. 400. .....325, 327	Thompson v. McCorkle, 136 Ind. 484 .....452
Sturgeon v. Sturgeon, 4 Ind. App. 232 .....417	Thompson v. Parker, 83 Ind. 96 .....236
Succession of Voorhels, 21 La. Ann. 659 .....693	Thompson v. Staats, 15 Wend. (N. Y.) 395.....617
Swales v. Grubbs, 126 Ind. 106 .....162	Thompson v. Thompson, 132 Ind. 288 .....325
Swinney v. Nave, 22 Ind. 178. 10	Thorogood v. Bryan, 8 C. B. 115 .....513, 525
Swope v. Leffingwell, 72 Mo. 348 .....481, 494	Throgmorton v. Davis, 4 Blackf. 174 .....11
Taber v. Grafmiller, 109 Ind. 206 .....665	Tiffany v. Bowerman, 2 Hun 643 .....8
Taggart v. State, 142 Ind. 668. .....171, 172, 176	Tilford v. City of Olathe, 44 Kan. 721 .....569
Tate v. Hamlin, 149 Ind. 94.. 649	Tinkler v. Swaynie, 71 Ind. 562 .....301
Tate v. Hamlin, 149 Ind. 107.. 694	
Tate v. Ohio, etc., R. R. Co., 10 Ind. 174.....305	
Taylor v. Calvert, 138 Ind. 67 .....98	
Taylor v. City of Fort Wayne, 47 Ind. 274.....569	

Toledo, etc., R. W. Co. v. Pennsylvania Co., 54 Fed. 751	43	Valentine v. Wisor, 123 Ind. 47	312
Town of Knightstown v. Musgrove, 116 Ind. 121....	514, 521	Vandevender v. Moore, 146 Ind. 44	267, 408
Town of Princeton v. Manck, 35 Ind. 51	571	Van Keuran v. Parmelee, 2 N. Y. 523	691, 693
Towns v. Smith, 115 Ind. 490.	415	Van Meter v. Borden, 25 N. J. Eq. 414.....	98
Townsend v. State, 147 Ind. 624	29, 30	Vaughan v. Godman, 94 Ind. 191	470
Townshend v. Gray, 62 Vt. 873	617	Venture Oil Co. v. Fretts, 152 Pa. St. 451.....	486
Township v. Board, etc., 110 Ind. 579	17	Vert v. Voss, 74 Ind. 565....	475
Traders Ins. Co. v. Newman, 120 Ind. 554	314	Vestal v. Little Rock, 54 Ark. 321	570
Tradesman Building, etc., Ass'n v. Thompson, 32 N. J. 183	494	Vicksburg, etc., R. R. Co. v. Dennis, 116 U. S. 665....	232, 250
Tribble v. Nichols, 53 Ark. 271.	493, 494	Vigo Township v. Board, etc., 111 Ind. 170	171
Trimble v. State, 145 Ind. 154	587	Vogel v. Brown School Township, 112 Ind. 317	16
Trout v. State, 107 Ind. 578..	85	Vogel v. Brown Township, 112 Ind. 299.....	16
Truitt v. Truitt, 38 Ind. 16..	107	Vogel v. Leichner, 102 Ind. 55.	396
Tucker v. Conrad, 103 Ind. 349	547	Vogel v. Little Rock, 55 Ark. 609	570
Tucker v. Sellers, 130 Ind. 514	423	Wagner v. Town of Garrett, 118 Ind. 114.....	363
Tufts, Tr., v. State, ex rel., 119 Ind. 232	212	Watson v. Thibou, 17 Abb. Prac. 184	8
Turbeville v. State, 42 Ind. 490	76	Walker v. Hill, 111 Ind. 223..	278
Turner v. Fitchburg R. R. Co., 145 Mass. 433.....	547	Walker v. State, 102 Ind. 502.	157
Turner v. Flenniken, 164 Pa. St. 469	594	Walker v. Steele, 121 Ind. 436	96
Tuttle v. Commonwealth, 2 Gray 506	654	Wallace's Appeal, 5 Pa. St. 103	477
Unfried v. Heberer, 63 Ind. 67	110	Walling v. Burgess, 122 Ind. 299	442, 488
Union, etc., Trust Co. v. Peters, 72 Miss 1058....	494, 496	Wallis v. Luhring, 134 Ind. 447	163
United States v. Barton, 24 Fed. Cas. No. 14,534.....	354	Walls v. Anderson, etc., R. R. Co., 60 Ind. 56.....	104
United States v. Gooding, 12 Wheat. 477	653	Walter v. James, L. R. 6 Exch. 124	476
United States v. Nibols, 27 Fed. Cas. No. 15,890....	354, 356	Walter v. State, 105 Ind. 589..	359
United States v. North Bloomfield Gravel Mining Co., 81 Fed. 243.....	42	Walter v. Walter, 117 Ind. 247	655
United States v. Paul, 6 Peters 141	351, 355	Ward v. Hazlerigg, 7 Blackf. 46	278
		Warey v. Forst, 102 Ind. 205.	396
		Warner v. Curran, 75 Ind. 309	240
		Warner v. Sohn, 112 Ind. 213.	102
		Wasson v. First Nat'l Bank, 107 Ind. 206.....	233

TABLE OF CASES CITED.

xxv

Waymire v. Lank, 121 Ind. 1.390	Willis v. Erie, etc., Co., 37 Minn. 347 .....139
Wayne Pike Co. v. Hammons, 129 Ind. 368 .....156, 157	Wills v. Browning, 98 Ind. 149 .....455
Weeden v. Arnold (Okl.), 49 Pac. 915 .....617	Willson v. Nickolson, 61 Ind. 241 .....312
Wendell v. Trotter, 127 Ind. 332 .....110	Willson v. Brookshire, 126 Ind. 497 .....98
Wenning v. Teeple, 144 Ind. 189 .....164	Willson v. Brown, 13 N. J. Eq. 277 .....493
Western Union Tel. Co. v. Huff, 102 Ind. 535 .....308	Willson v. Campbell, 119 Ind. 286 .....624
Western Union Tel. Co. v. State, 146 Ind. 54..... 28	Wilson v. Galey, 103 Ind. 257. 69
Western Union Tel. Co. v. State, 147 Ind. 274.....390	Willson v. McMillan, 62 Ga. 16 .....683
Western Union Tel. Co. v. Taggart, 141 Ind. 281.....254	Wilson v. Murray, 90 Ind. 477 .....475
Western, etc., Co. v. Williams, 86 Va. 696 .....139	Wilson v. State, 150 Ind. 697.274
Wheaton v. Hibbard, 20 Johns. 290 .....382, 388	Wilson v. Vance, 55 Ind. 394..411
White v. Knapp, 8 Page 173..494	Winchell v. Hicks, 18 N. Y. 558 .....693
White v. Perry, 14 W. Va. 66.416	Windfall Mfg. Co. v. Emery, 142 Ind. 456 .....572
White v. State, 69 Ind. 273..440	Windman v. City of Vincennes, 58 Ind. 480.....571, 574
Whiteselle v. Texas Loan Agency (Tex. Civ. App.), 27 S. W. 309 .....494	Winter v. Dickerson, 42 Ala. 92 .....387
Whitney v. Maine Central R. Co., 69 Me. 208.....400	Wood v. Hughes, 138 Ind. 179.483
Whitney v. Mills, 6 Blackf. 545 .....278	Wood v. Kennedy, 19 Ind. 68.382
Wilcox v. City of Tipton, 143 Ind. 241 .....572, 574	Wood v. Lath, 13 Wis. 84....388
Wiles v. Hoss, 114 Ind. 371..665	Wood v. State, 92 Ind. 269.... 85
Wiley v. Carlisle, 93 Ala. 238. 98	Wood v. State, ex rel., 130 Ind. 364 .....271, 656
Wiley v. Forsee, 6 Blackf. 246.278	Woodcock v. McQueen, 11 Ind. 14 .....342
Wilkins v. State, 113 Ind. 514.617	Woodfill v. Town of Greensburg, 18 Ind. 203.....153, 571
Willey v. State, ex rel., 105 Ind. 453 .....690	Woodford v. Leavenworth, 14 Ind. 311 .....476, 498
Williams v. Drewe, Willes 392 .....354	Woodward v. Mitchell, 140 Ind. 406 .....442
Williams v. Kessler, 82 Ind. 183 .....455	Woollen v. Wire, Admr., 110 Ind. 251 .....162
Williams v. Mansur, 70 Ind. 41 .....676	Worthley v. Burbanks, 146 Ind. 534 .....700
Williams v. People, 121 Ill. 84.616	Wright v. Manns, 111 Ind. 422 .....96
Williams v. Potter, 72 Ind. 355 .....680	Wright v. Moody, 116 Ind. 175.301
Williams v. Urmston, 35 Ohio St. 296 .....486	Wynn v. Troy, 109 Ind. 250..102
Williams v. Wilder, 37 Vt. 613 .....388	Wysor v. Johnson, 130 Ind. 270 .....215
Williamson v. Kokomo Building, etc., Ass'n, 89 Ind. 389..440	Yandes v. Lefavour, 2 Blackf. 371 .....692
Wille v. Green, 2 N. H. 333.388	Yater v. State, 58 Ind. 290...314

Yazoo, etc., R. R. Co. v. Thomas, 132 U. S. 174.....	33	Young v. Miller, 145 Ind. 652.	
Yearley v. Sharp, 96 Ind. 469.	96	.....	161, 163
Yellow Hammer, etc., Co. v. Carlin, 148 Ind. 68.....	48, 634	Young v. Warder, 94 Ind. 357.	537
Yingst v. Lebanon, etc., R. W. Co., 167 Pa. St. 438.....	400	Zelgler v. Scott, 10 Ga. 389...	382
Yonkey v. State, ex rel., 27 Ind. 236	430	Zelgler v. Scott, 54 Am. Dec.	
York v. Lockwood, 132 Ind. 358	414	400	388
York Telephone Co. v. Keesey, 5 Penn. Dis. Rep. 366..	135, 137	Zellinski v. State, 150 Ind.	
		700	701
		Zellerbach v. Allenberg, 67 Cal. 296	18

STATUTES CITED AND CONSTRUED.

Section 66, Burns' R. S. 1894	(66, R. S. 1881).....	335
Section 240, Burns' R. S. 1894	(240, R. S. 1881).....	182
Section 248, Burns' R. S. 1894	(248, Horner's R. S. 1897)..	386
Section 251, Burns' R. S. 1894	(251, R. S. 1881).....	337
Sections 251, 252, Burns' R. S. 1894	(251, 252, R. S. 1881)..	344
Section 255, Burns' R. S. 1894	(254, R. S. 1881).....	344
Section 256, Burns' R. S. 1894	(255, R. S. 1881).....	70
Section 257, Burns' R. S. 1894	(256, R. S. 1881).....	70
Section 261, Burns' R. S. 1894	(260, R. S. 1881).....	70
Section 263, Burns' R. S. 1894	(262, R. S. 1881).....	306
Section 277, Burns' R. S. 1894	(276, R. S. 1881).....	331
Section 281, Burns' R. S. 1894	(280, R. S. 1881).....	306
Sections 290, 292, Burns' R. S. 1894	(289, 291, R. S. 1881)...	36
Section 302, Burns' R. S. 1894	(301, R. S. 1881).....	690
Section 303, Burns' R. S. 1894	(302, R. S. 1881).....	690
Section 342, Burns' R. S. 1894	(339, R. S. 1881).....	27
Section 344, Burns' R. S. 1894	(341, R. S. 1881).....	69
Section 346, Burns' R. S. 1894	(343, R. S. 1881).....	311
Section 348, Burns' R. S. 1894	(345, R. S. 1881).....	346
Section 372, Burns' R. S. 1894	(369, R. S. 1881).....	329
Section 385, Burns' R. S. 1894	(382, R. S. 1881).....	577
Section 386, Burns' R. S. 1894	(383, R. S. 1881).....	590
Section 399, Burns' R. S. 1894	(396, Horner's R. S. 1897)..	452
Section 402, Burns' R. S. 1894	(399, R. S. 1881).....	7
Section 407, Burns' R. S. 1894	.....	92
Section 504, Burns' R. S. 1894	(406, Horner's R. S. 1897)..	629
Sections 506, 507, Burns' R. S. 1894,	(408, 499, Horner's R. S. 1897).....	629
Section 568, R. S. 1881	.....	315
Section 570, Burns' R. S. 1894	(561, R. S. 1881).....	317, 411
Section 577, Burns' R. S. 1894	(568, R. S. 1881).....	314
Section 612, Burns' R. S. 1894	(603, R. S. 1881).....	331, 474
Section 624, Burns' R. S. 1894	.....	273
Section 638, Burns' R. S. 1894	(626, R. S. 1881).....	563
Section 644, Burns' R. S. 1894	(632, R. S. 1881).....	63
Section 652, Burns' R. S. 1894	(640, R. S. 1881).....	649
Section 661, Burns' R. S. 1894	(649, R. S. 1881).....	49, 184
Section 662, Burns' R. S. 1894	(650, R. S. 1881).....	103
Section 667, Burns' R. S. 1894	.....	99
Section 702, Burns' R. S. 1894	(710, Thornton's R. S. 1897).	474
Section 709, Burns' R. S. 1894	(717, Thornton's R. S. 1897).	474
Section 736, Burns' R. S. 1894	(724, R. S. 1881).....	416
Sections 773, 774, Burns' R. S. 1894	(761, 762, Horner's R. S. 1897).....	266
Section 783, Burns' R. S. 1894	(771, Horner's R. S. 1897)..	266
Section 785, Burns' R. S. 1894	(773, Horner's R. S. 1897)..	269
Section 931, Burns' R. S. 1894	(919, R. S. 1881).....	446
Section 980, Burns' R. S. 1894	(968, R. S. 1881).....	106

xxviii STATUTES CITED AND CONSTRUED.

Section 1054, Burns' R. S. 1894 (1042, R. S. 1881).....	419
Section 1057, Burns' R. S. 1894 (1045, R. S. 1881).....	327
Section 1062, Burns' R. S. 1894.....	92, 93
Section 1066, Burns' R. S. 1894 (1054, R. S. 1881).....	606
Section 1067, Burns' R. S. 1894 (1055, R. S. 1881).....	488
Section 1076, Burns' R. S. 1894 (1064, R. S. 1881).....	92, 606
Section 1077, Burns' R. S. 1894 (1065, R. S. 1881).....	605
Section 1082, Burns' R. S. 1894 (1070, R. S. 1881).....	93, 606
Sections 1145, 1146, Burns' R. S. 1894 (1131, 1132, R. S. 1881)..	464
Sections 1145, 1160, Burns' R. S. 1894	429
Section 1208, Burns' R. S. 1894 (1104, R. S. 1881).....	70
Section 1223, Burns' R. S. 1894 (1237, Thornton's R. S. 1897). 474	
Section 1238, Burns' R. S. 1894 (1222, R. S. 1881).....	285
Section 1300, Burns' R. S. 1894 (1285, R. S. 1881).....	219, 245, 337
Section 1362, Burns' R. S. 1894 (6586, Horner's R. S. 1897)..	60
Section 1442, Burns' R. S. 1894 (1379, R. S. 1881).....	156
Section 1444, Burns' R. S. 1894 (1381, R. S. 1881).....	158
Section 1445, Burns' R. S. 1894 (1382, R. S. 1881).....	158
Section 1446, Burns' R. S. 1894 (1383, R. S. 1881).....	158
Section 1447, Burns' R. S. 1894 (1383a, Horner's R. S. 1897). 157	
Section 1448, Burns' R. S. 1894 (1384, R. S. 1881).....	158
Section 1476, R. S. 1894 (1410 R. S. 1881)	215
Section 1642, Burns' R. S. 1894 (1573, Horner's R. S. 1897)..	295
Section 1706, Burns' R. S. 1894 (1637, R. S. 1881).....	63
Section 1805, Burns' R. S. 1894 (1736, Horner's R. S. 1897)..	652
Section 1964, Burns' R. S. 1894 (1891, R. S. 1881).....	85
Section 2007, Burns' R. S. 1894 (1934, Horner's R. S. 1897)..	654, 700
Section 2012, Burns' R. S. 1894 (1935, R. S. 1881).....	302
Section 2075, Burns' R. S. 1894 (1989, Horner's R. S. 1897)..	295
Section 2105, Burns' R. S. 1894.....	558
Section 2186, Burns' R. S. 1894 (2090, R. S. 1881).....	351
Sections 2316, 2318, Burns' R. S. 1894	28
Sections 2486, 2487, 2488, Burns' R. S. 1894 (2333, 2334, 2335, Horner's R. S. 1897).....	270
Sections 2503, 2504, Burns' R. S. 1894 (2348, 2349, Horner's R. S. 1897).....	111, 112, 113
Sections 2609, 2610, Burns' R. S. 1894	96
Sections 2644, 2653, Burns' R. S. 1894	641
Section 2651, R. S. 1881.....	171
Section 2660, Burns' R. S. 1894 (2499, R. S. 1881).....	407
Sections 2661, 2663, Burns' R. S. 1894 (2500, 2502, R. S. 1881). 641	
Section 2673, Burns' R. S. 1894 (2512, R. S. 1881).....	71
Section 2676, Burns' R. S. 1894 (2515, R. S. 1881).....	72
Section 2682, Burns' R. S. 1894 (2518, R. S. 1881).....	73
Section 2685, Burns' R. S. 1894 (2521, R. S. 1881).....	70, 73
Section 2750, Burns' R. S. 1894.....	201
Section 2754, Burns' R. S. 1894, et seq	202
Section 3631, Burns' R. S. 1894 (3168, R. S. 1881).....	149
Section 3643, Burns' R. S. 1894 (3180, R. S. 1881).....	149
Section 3659, Burns' R. S. 1894 (3196, R. S. 1881).....	152
Sections 4224, 4227, Burns' R. S. 1894 (3243, 3246, Horner's R. S. 1897)	571, 573
Section 4226, Burns' R. S. 1894 (3245, Horner's R. S. 1897)..	573
Section 4352, Burns' R. S. 1894 (3328, R. S. 1881).....	664
Section 4394, Burns' R. S. 1894 (3357, R. S. 1881).....	664
Section 4395, Burns' R. S. 1894 (3358, R. S. 1881).....	665
Section 4404, Burns' R. S. 1894 (3367, R. S. 1881).....	664

STATUTES CITED AND CONSTRUED. xxix

Sections 4426, 4427, Burns' R. S. 1894 (3389, 3390, Horner's R. S. 1897).....	565
Section 5051, Burns' R. S. 1894 (3851, Horner's R. S. 1897)...	186
Section 5060, Burns' R. S. 1894 (3859, R. S. 1881).....	191, 192, 196, 198
Section 5062, Burns' R. S. 1894 (3861, R. S. 1881).....	196, 198
Section 5071, Burns' R. S. 1894 (3863, R. S. 1881).....	190, 196, 198
Section 5073, Burns' R. S. 1894 (3865, R. S. 1881).....	198, 199
Section 5076, Burns' R. S. 1894 (3868, R. S. 1881).....	197, 198
Section 5160, Burns' R. S. 1894 (3907, R. S. 1881).....	147
Section 5209, R. S. U. S.	125
Sections 5312, 5316, 5318, R. S. 1881	348
Section 5340, Burns' R. S. 1894 (4045, R. S. 1881).....	420
Section 5342, Burns' R. S. 1894 (4047, R. S. 1881).....	422
Section 5352a, Horner's R. S. 1897.....	606
Section 5368, Burns' R. S. 1894 (4008, R. S. 1881).....	424
Section 5655, Burns' R. S. 1894 (4285, R. S. 1881).....	176
Section 5671, Burns' R. S. 1894 (4301, R. S. 1881).....	177
Section 5672, Burns' R. S. 1894 (4302, R. S. 1881).....	177
Section 5750, Burns' R. S. 1894 (4325, R. S. 1881).....	55
Section 5811, Burns' R. S. 1894 (4383, R. S. 1881).....	58
Section 5812, Burns' R. S. 1894 (1256, Elliott's Supp.).....	58
Section 5820, Burns' R. S. 1894 (4391, R. S. 1881).....	58
Section 5900, Burns' R. S. 1894 (4424, R. S. 1881).....	458
Section 5920a, Burns' R. S. 1894.....	210, 212
Section 5973, Burns' R. S. 1894 (4486, R. S. 1881).....	599
Section 6027, Burns' R. S. 1894 (4536, R. S. 1881).....	16
Section 6676, Burns' R. S. 1894 (4951, R. S. 1881).....	334
Sections 6676, 6678, Burns' R. S. 1894 (4951, 4953, R. S. 1881)...	334
Section 6377, Burns' R. S. 1894 (4952, R. S. 1881).....	340
Section 6678, Burns' R. S. 1894 (4953, R. S. 1881).....	335
Section 6762, Burns' R. S. 1894 (5035, R. S. 1881).....	547
Section 6961, Burns' R. S. 1894 (5116, Horner's R. S. 1897)...	483
Sections 7043-7050, Burns' R. S. 1894 (5193-5205, Horner's R. S. 1897)	386
Section 7046, Burns' R. S. 1894 (5201, Horner's R. S. 1897)...	382, 387
Section 7050, Burns' R. S. 1894 (5205, Horner's R. S. 1897)...	386
Sections 7255, 7256, Burns' R. S. 1894	696
Section 7258, Burns' R. S. 1894.....	696
Sections 7276, 7281, 7283, Burns' R. S. 1894.....	349
Section 7278, Burns' R. S. 1894 (5314, R. S. 1881).....	377
Section 7285, Burns' R. S. 1894 (5320, R. S. 1881).....	349, 350
Section 7290, Burns' R. S. 1894 (5325, R. S. 1881).....	324
Section 7318, et seq., Burns' R. S. 1894	609
Section 7510, Burns' R. S. 1894.....	28
Section 7860, Burns' R. S. 1894 (5773, R. S. 1881).....	421
Section 7861, Burns' R. S. 1894 (5774, R. S. 1881).....	421
Section 8025, Burns' R. S. 1894 (5951, R. S. 1881).....	625
Section 8030, Burns' R. S. 1894 (5955, R. S. 1881).....	624
Section 8253, et seq., supplement to Burns' R. S. 1894.....	700
Section 8410, Burns' R. S. 1894.....	218, 242
Section 8411, Burns' R. S. 1894.....	248, 259
Section 8412, Burns' R. S. 1894.....	242
Section 8458, Burns' R. S. 1894.....	244, 248
Section 8460, Burns' R. S. 1894.....	245, 257, 258
Section 8477, Burns' R. S. 1894.....	254
Section 8484, Burns' R. S. 1894.....	254
Sections 8497, 8498, Burns' R. S. 1894	252

xxx STATUTES CITED AND CONSTRUED.

Section 8501, Burns' R. S. 1894.....	114
Section 8502, Burns' R. S. 1894.....	114
Section 8507, Burns' R. S. 1894.....	240
Section 8523, Burns' R. S. 1894.....	114
Section 8526, Burns' R. S. 1894.....	115
Section 8532, Burns' R. S. 1894.....	114, 259
Section 8538, Burns' R. S. 1894.....	237, 251, 256
Section 8555, Burns' R. S. 1894.....	251
Section 8676, Burns' R. S. 1894.....	237, 256
R. S. 1831, p. 426.....	255
R. S. 1838, p. 375.....	278
R. S. 1843, p. 580.....	383
R. S. 1843, p. 581.....	383
1 R. S. 1852, p. 105.....	256
1 R. S. 1876, p. 641.....	313
1 Davis R. S. 1876, 72.....	256
1 Davis R. S. 1876, 73.....	239
1 Davis R. S. 1876, p. 127.....	631
1 Davis R. S. 1876, p. 599.....	385
1 Davis R. S. 1876, p. 600.....	384, 386
3 Davis R. S. 1876, p. 316.....	384, 386
3 Davis R. S. 1876, p. 317.....	385
2 Gavin & Hord, pp. 656, 657.....	384
Acts 1859, p. 185.....	357
Acts 1861, p. 138.....	384
Acts Sp. Sess. 1865, p. 176.....	384, 386, 389
Acts 1867, p. 151.....	385
Acts 1872, p. 57.....	223, 239
Acts 1872, p. 115.....	631
Acts 1873, p. 194.....	215
Acts 1877, p. 43.....	177
Acts 1877, p. 73.....	387
Acts 1877 Sp. Sess., p. 68.....	676
Acts 1879, p. 43.....	386, 389
Acts 1881, p. 240.....	650
Acts 1885, p. 197.....	609, 611
Acts 1887, p. 30.....	669
Acts 1887, p. 40.....	240
Acts 1889, p. 257.....	686
Acts 1891, p. 55.....	28
Acts 1891, p. 341.....	669
Acts 1893, p. 17.....	210
Acts 1893, p. 31.....	60
Acts 1893, p. 50.....	204
Acts 1893, p. 300.....	28, 694
Acts 1893, p. 305.....	670
Acts 1893, p. 374.....	254
Acts 1895, p. 21.....	245
Acts 1895, p. 24.....	258
Acts 1895, p. 74.....	259
Acts 1895, p. 134.....	670, 677
Acts 1895, p. 248.....	361, 657
Acts 1895, p. 250.....	371
Acts 1897, p. 69.....	294
Acts 1897, p. 73.....	654
Acts 1897, p. 219.....	274, 654
Acts 1897, p. 244.....	370, 654
Acts 1897, p. 253.....	348
Acts 1897, p. 255.....	608
Acts 1897, p. 277.....	619

JUDGES
OF THE
SUPREME COURT

OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. TIMOTHY E. HOWARD. *†

HON. LEONARD J. HACKNEY. †

HON. LEANDER J. MONKS. ‡

HON. JAMES H. JORDAN. ‡

HON. JAMES McCABE. ‡

* Chief Justice at November Term, 1897.

† Chief Justice at May Term, 1898.

‡ Term of office commenced January 1, 1893.

‡ Term of office commenced January 1, 1895.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID A. ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1897, AND MAY TERM,
1898, IN THE EIGHTY-SECOND YEAR OF THE STATE.

MARSHALL v. SEAMEN ET AL.

[No. 18,271. Filed December 15, 1897. Rehearing denied March 9, 1898.]

APPEAL.—Bill of Exceptions.—Longhand Manuscript of Evidence.—

The record must affirmatively show that the longhand manuscript of evidence was filed in the clerk's office before it was incorporated in the bill of exceptions.

From the Marion Superior Court. *Affirmed.*

Robert E. Smith, B. K. Elliott and W. F. Elliott, for appellant.

John M. Bailey, E. H. Parker and W. H. Ogborn, for appellees.

HOWARD, C. J.—The record in this case is in a most unsatisfactory condition. The briefs of counsel relate almost exclusively to questions arising under the court's action in overruling the motion for a new trial. A proper disposition of those questions would require a consideration of the evidence, which, however, does not seem to be in the record. The bill of exceptions purporting to embody the longhand manuscript of the

Marshall v. Seamen et al.

evidence was filed May 23, 1896. The longhand manuscript itself was also filed on that day, but whether before or after its incorporation into the bill of exceptions does not appear. Besides, the bill of exceptions does not follow the entry showing the date of its filing; but the entry is followed by the following memorandum, intended, probably, to direct attention to where the bill may be found: "(Memo. See entry of March 26, 1896, for this longhand manuscript.)" Even if we might conjecture that by "this longhand manuscript" was meant the bill of exceptions; and even if we passed over the rule which requires that reference to the record should be made by page and line; still that would not help matters, for we have been unable to find any entry of March 26, 1896. We do find an entry of May 26, 1896; but that entry refers to the filing of a "supplemental bill of exceptions." These are a few instances of many acts of carelessness in making up what is called a transcript of the record.

In the statement of facts in appellant's brief is the following: "John J. Marshall loaned to Mary E. Seaman and Joseph Seaman \$200.00 in money, taking two promissory notes for \$110.00 each, one payable in ninety days from date and one payable in one hundred and eighty days from date, with five per cent. attorney's fees on each note, and interest at eight per cent. per annum after maturity. The money was paid to them on the 30th day of April, 1895, and the notes were dated the same day; and to secure the payment of the same notes Seamen and Seamen executed a chattel mortgage on a stock of groceries and fixtures and butcher's outfit all complete, also one horse and wagon and phaeton and harness, the whole valued at \$700.00, and of the value of \$700.00." The notes seem to have been well secured. The ten dollars in each note over the money loaned was evidently interest in

Marshall v. Seamen et al.

advance; if, indeed, a charge of ten dollars for the use of one hundred dollars for 90 or 180 days can be called interest.

Suit to collect the notes and foreclose the mortgage was brought July 29, 1895; and on the same date attachment proceedings were instituted under which the mortgaged goods seem to have been taken and sold. Afterwards, however, it was apparently discovered that the notes being commercial paper, there was nothing yet due, even on the first note, at the time the suit was brought. Instead of filing a plea in abatement, a demurrer was for this or some other reason filed and sustained to the complaint, and leave was granted to file an amended complaint. It seems therefore to be conceded that the attachment proceedings were invalid, as being based upon an action prematurely brought.

It appears also that the original defendants, Seamen and Seaman, who had given the notes and mortgage, had, before the commencement of the action against them, sold to their codefendants, the appellees Frazier and McIntosh, all the property in controversy, subject to the mortgage. Frazier & McIntosh first demurred to and then answered the amended complaint; but Seamen and Seamen, without pleading to this complaint, and without objection by appellant, withdrew their appearance before judgment. Afterwards judgment was rendered against appellant for costs.

Neither the record nor the briefs show upon what grounds the judgment was based; but in the condition in which the pleadings and the transcript are found we are unable to do otherwise than affirm the judgment. Judgment affirmed.

 Barker v. Prizer.

150	4
159	349
159	608

BARKER v. PRIZER.

[No. 18,191. Filed Nov. 2, 1897. Rehearing denied March 9, 1898.]

PLEADING.—*Supplemental Complaint.*—*Slander.*—Defamatory words uttered by defendant after the commencement of an action for slander constitute a separate and distinct right of action, and cannot be brought into the original action by means of a supplemental complaint. pp. 6-11.

SLANDER.—*Evidence of Other Slandorous Words.*—*Malice.*—In an action for slander, evidence of other similar words spoken at other times and places, whether spoken prior or subsequent to the beginning of the action, are admissible to show that the words charged in the complaint were spoken with malice. pp. 10, 11.

From the Elkhart Circuit Court. *Reversed.*

O. T. Chamberlain, P. L. Turner, J. M. Van Fleet
and *V. W. Van Fleet*, for appellant.

Henry C. Dodge, for appellee.

JORDAN, J.—On July 16, 1895, appellee commenced this action in the lower court against appellant to recover damages for uttering certain alleged slanderous words, whereby he imputed to her unchaste conduct. The complaint is in two paragraphs. The first charges that the words therein complained of were spoken by the defendant on July 9, 1895; and the second, that the words therein mentioned were uttered on August 9, 1894, and "on divers times since that date." Damages in the sum of \$5,000.00 are demanded. Demurrers to each of these paragraphs were overruled; and on October 7, 1895, before the cause had been put at issue on the original complaint, the plaintiff filed what is denominated a supplemental complaint, wherein she alleges that on the — day of August, 1895, and on the — day of September, 1895, the defendant, on both of these occasions, spoke of and concerning her other slanderous words imputing to her unchaste conduct. This supplemental plead-

Barker v. Prizer.

ing closes with the averments that the words set out in the original complaint, together with those embraced therein "all have injured and damaged her in the sum of \$10,000.00," and judgment is demanded for that amount. The evident purpose and object of this latter complaint, as it discloses, is to bring into the suit other actionable defamatory words, uttered after the filing of the original, and thereby recover damages thereon. Appellant, in his answer, pleaded matters by way of justification and mitigation of the alleged slander set out in the original and supplemental complaint. Upon the issues joined, a trial by jury resulted in a verdict in favor of the plaintiff for \$5,500.00, and, over appellant's motion for a new trial, judgment was rendered for this amount. Numerous rulings of the trial court are assailed by counsel for the appellant, and presented for our consideration. The court on its own motion gave five instructions to the jury. Of these, counsel for appellant specially criticise and condemn the fifth, which is as follows: "(5) Upon the issues joined upon the supplemental complaint by the second paragraph of answer, if you find by a fair preponderance of the evidence that the matters set up in this second paragraph of answer are true, then on this issue your verdict must be for the defendant; but if you do not find them to be true, then your verdict must be for the plaintiff, and you must assess the damages at such sum as shall, in your judgment, be a just compensation for the wrong done her, including in your deliberations her anguish of mind, shame and consequent humiliation, and to this, if you find express malice prompted the speaking of the words, you may add such punitive damages as, in your judgment, will deter defendant from again uttering such falsehoods." The court, at the request of the plaintiff, also gave substantially the same instruction in regard to the

Barker v. Prizer.

assessment of damages in the event the jury found for plaintiff upon the first and second paragraphs of her original complaint. The jury therefore was fully advised by the court to assess damages, if they found for the plaintiff, upon the words set up in the original and also upon those contained in the supplemental complaint.

Appellant insists that there are two sufficient reasons why the court erred in giving the fifth charge to the jury. First, that the court was not authorized under the law to advise the jury, as it did, in effect, that, in the event the matters set up by way of justification in the second paragraph of the answer were not established, they must assess damages on the words alleged in the supplemental complaint; second, that the court assumed in this instruction that the plaintiff had been subjected to "anguish of mind, shame, and consequent humiliation," and then informed the jury that they must include these matters in their estimation of damages. On the first proposition, appellant's specific insistence is that for the reason that the alleged slanderous words mentioned in the supplemental complaint were spoken, as the pleading shows, after the commencement of this action, therefore they cannot be tacked on to the cause of action set up in the original complaint, and damages allowed in this suit, as and for an additional cause of action. Counsel for the appellee, on the other hand, contends in support of the court's action in charging the jury as it did, that the civil code expressly gives the right to file supplemental pleadings showing facts that occurred after the former pleading was filed; that this supplemental pleading, when filed, became a part of the original complaint in the cause and entitled appellee to recover damages for the false and defamatory words set up in the former.

Barker v. Prizer.

This action, as we have seen, was begun on July 16, 1895, and the words upon which plaintiff relies for a recovery, were alleged to have been uttered in August, 1894, and on July 9, 1895. Counsel for appellee does not controvert but what the words set up in the supplemental complaint constitute a separate and distinct cause of action. Section 402, Burns' R. S. 1894 (399, R. S. 1881), being section 138 of the civil code provides as follows: "The court may, on motion, allow supplemental pleadings, showing facts which occurred after the former pleadings were filed." A supplemental complaint as authorized to be filed by the above section has been repeatedly held, by this court, to be an additional complaint stating facts arising since the filing of the original complaint. It does not, however, supersede the latter, but becomes a part thereof, and together both constitute the complaint in the action. As the supplemental complaint forms a part of the original, a demurrer addressed to the former alone, is not permitted in our practice. If the original complaint does not state a cause of action, a supplemental one cannot be employed to aid the former in this respect, by setting up a right of action which did not exist at the time the original was filed. In support of these propositions, see *Musselman v. Manly*, 42 Ind. 462; *Farris v. Jones*, 112 Ind. 498; *Patten v. Stewart*, 24 Ind. 332; *Dillman v. Dillman*, 90 Ind. 585; *Kimble v. Seal*, 92 Ind. 276; *Pouder v. Tate*, 132 Ind. 327. The above rules as asserted by the decisions of this court, are, in the main, in harmony with those which control a supplemental bill in the practice in chancery. In fact, our code in permitting supplemental pleadings to be filed intended to follow the former rule recognized in courts of chancery. *Kimble v. Seal*, *supra*. We may, therefore, properly apply to the authorities on chancery procedure, and

Barker v. Prizer.

therefrom ascertain the nature of and purpose of a supplemental bill in suits of equity, in order to arrive at a correct interpretation of what purpose a supplemental complaint, under our code of practice, was intended to serve. In Gibson on Suits in Chancery, section 651, the author speaking in reference to such a bill says: "The purpose of the bill must be either (1) to supply some deficiency in the frame of the original bill, or (2) to bring forward some facts pertinent to the controversy not already alleged, or (3) to make some necessary party not before the court, or (4) to do any two or more of these things." This statement serves to give at least a general outline of the purpose and object of such bills under the chancery practice. See, also, Story's Eq. Pleadings, sections 332, 334, and 337.

It is well affirmed by the authorities that the facts set up by way of supplemental bill or complaint must be consistent with and in aid of the case made by the original complaint. But the question with which we have to deal in this appeal is: Can a new and independent cause of action which has accrued in favor of the plaintiff, since the filing of the original complaint, and upon which a recovery may be had without regard to the cause of action stated in the latter, be set up by means of a supplemental complaint, and a recovery authorized thereon in the suit? This question, under a rule firmly settled, must be answered in the negative. See *Millner v. Millner*, 2 Edwards Ch. 114; *Wattson v. Thibou*, 17 Abb. Prac. 184; *Tiffany v. Bowcrman*, 2 Hun. 643; *Pinch v. Anthony*, 10 Allen 470; *Bull v. Rothschild*, 4 N. Y. Supp. 826. In support of this proposition, however, we need not confine our search to the decisions of the higher courts of other jurisdictions, for the same rule is recognized and affirmed by our own decisions. See *Patten v. Stewart*, *supra*; *Musselman v. Manly*, *supra*; *Kimble v. Seal*, *supra*.

Barker v. Prizer.

In *Patten v. Stewart*, on pp. 343 and 344 of the opinion, it is said: "But if the original complaint is wholly defective, and without equity, so that no valid decree can be rendered on it, the plaintiff cannot, by filing a supplemental complaint founded upon matters which have taken place subsequent to the commencement of the suit, sustain the proceedings originally commenced. 1 Paige 169.

"Here, as we have seen, the original complaint was defective, and under it the plaintiff could not sustain the action, and a demurrer had been sustained to it by the court below. If the amendment, therefore, can be sustained as entitling the plaintiff to any relief, it must be upon the ground that it contains within itself a valid cause of action, and, as the facts set up have occurred since the filing of the original complaint, they cannot be engrafted upon that complaint so as to sustain it, for the cause of action must have existed before the commencement of the suit."

In *Musselman v. Manly*, *supra*, the appellant sought to recover of the appellee damages for removing earth from an alley adjacent to the premises of the former. On the trial the appellant offered to prove that earth was removed from the alley by the appellee after the filing of the original complaint, but prior to the filing of the supplemental complaint, for the purpose of recovering damages which had accrued since the commencement of the action. This evidence was rejected by the trial court. The claim to introduce it was based upon certain allegations in the supplemental complaint. This court in sustaining the action of the trial court in excluding the evidence in question held that the plaintiff's right to recover was limited to such damages as had accrued at the beginning of his action, and said: "It is the general rule that the plaintiff, in an action based on contract, can only recover for such

Barker v. Prizer.

sum as may be due at the time the action is brought; and in an action founded in tort, for such damages as had accrued at the commencement of the action. *Maxwell v. Boyne*, 36 Ind. 120."

In *Swinney v. Nave*, 22 Ind. 178, it is held, that all slanderous words spoken at a given time constitute a cause of action. The same, or other words, uttered at a different time constitute another cause of action, and in accord with the spirit of the code, the plaintiff, in a slander suit, should include all such rights of action, accruing up to the commencement of his suit, in separate paragraphs of his complaint. It is clear, under this rule, that the alleged slanderous words in the so termed supplemental complaint, which are laid as having been spoken on different occasions in August and September after the commencement of this action, constitute separate and distinct rights of action. They were wholly independent, and disconnected with the words alleged and relied on as a cause of action in the original complaint, and, under the rule to which we have referred, they could not be brought into the action by means of a supplemental pleading filed under the provisions of section 138 of the civil code, and thereby entitle the plaintiff to a recovery thereon.

Where a slander is uttered with express or actual malice, the recovery is not limited to compensatory damages only, but the jury may in its discretion impose in addition exemplary or punitive damages. *De Pew v. Robinson*, 95 Ind. 109. For the purpose of proving that the defendant was prompted by such malice in speaking the slanderous words of which the plaintiff complains in his complaint, other or similar words spoken by defendant at other times and places, whether spoken prior or subsequent to the beginning of the action, are admissible in evidence for such

Barker v. Prizer.

purpose without being pleaded. *Forbes v. Meyers*, 8 Blackf. 74; *Casey v. Hulgan*, 118 Ind. 590; *Freeman v. Sanderson*, 123 Ind. 264; *Halley v. Gregg*, 74 Iowa 563, 38 N. W. 416; 2 Greenleaf on Ev., section 271; Odgers on Libel and Slander, *page 272. But in such cases when the words, introduced in evidence for this purpose, are actionable within themselves, the court should caution the jury not to give any damages on their account. 2 Greenleaf on Ev., section 271; Odgers on Libel and Slander, *supra*.

In *M'Glernery v. Keller*, 3 Blackf. 488, actionable words laid in the declaration in that case, but spoken after the commencement of the suit, were admitted in evidence, the trial court saying in the hearing of the jury that they were admissible in aggravation of damages. It was there held that this declaration of the court was reversible error, and in passing upon the question the court said: "This evidence was certainly inadmissible for the purpose of aggravating the damages. The plaintiff could not, in this action, recover damages for words spoken after the commencement of the suit." The doctrine affirmed in that case has been reaffirmed and adhered to in *Throgmorton v. Davis*, 4 Blackf. 174; *M'Intire v. Young*, 6 Blackf. 496, 39 Am. Dec. 443; *Schoonover v. Rowe*, 7 Blackf. 202; *Forbes v. Myers*, *supra*; *Burson v. Edwards*, 1 Ind. 164; *Meyers v. Bohlfig*, 44 Ind. 238.

The jury, as it appears, gave the appellee five hundred dollars more than she demanded in her original complaint, and it is evident, we think, that the erroneous statement of the law to the jury by the court in its fifth instruction, to the effect that they must assess damages for the words set up in the supplemental complaint, may have, and no doubt did, mislead them in estimating the damages, and for this error the judgment must be reversed.

Adams School Township v. Irwin.

The instruction may also possibly be bad for the second reason urged by appellant, but as to this we do not decide. The other alleged errors argued by counsel for appellant may not occur on another trial, hence we pass them without consideration. Counsel for appellee at a late hour insists that the evidence is not in the record, but as the question which we decide does not depend on the evidence, we need not determine whether the evidence is properly in the record. The judgment is reversed, and the cause remanded to the lower court with instructions to grant the appellant a new trial.

ADAMS SCHOOL TOWNSHIP v. IRWIN.

[No. 18,828. Filed March 10, 1898.]

JUDGMENT.—*Setting Aside for Fraud.—Presumption.*—In an action to set aside and vacate a judgment taken by default, it will be presumed in the absence of any showing to the contrary, that the plaintiff procuring such judgment commenced his action in the proper court, in the usual and ordinary way, by filing a complaint, and by serving the proper process on the proper party. *p. 16.*

SAME.—*Action by Township to Set Aside for Fraud.*—Where a judgment against a school township was taken by default, through the connivance of the trustee on whom process was properly served, such judgment will not be vacated at the instance of the township, where it is not shown that the plaintiff procuring the judgment was guilty of any fraud. *pp. 16-20.*

From the Henry Circuit Court. *Affirmed.*

F. A. Walker and *F. P. Foster*, for appellant.

M. A. Chipman, *S. M. Keltner* and *E. E. Hendee*, for appellee.

JORDAN, J.—Appellant, Adams school township, in Madison county, Indiana, began this action against the appellee in the Madison Circuit Court, on January 2, 1896. On motion, the cause was venued to the Henry Circuit Court, wherein a demurrer was sus-

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157	172
150	12
158	210
150	12
159	589
150	12
167	157

Adams School Township v. Irwin.

tained to the complaint for insufficiency of facts, and appellee recovered judgment on demurrer.

The object of the proceedings was to set aside and vacate a judgment rendered in favor of the appellee against the appellant, upon default, in the Madison Circuit Court, on May 4, 1892, upon the grounds of alleged fraud. The prayer of the complaint is that all proceedings on the judgment be vacated, and the default of the plaintiff in the action in which the judgment was rendered be set aside, and that it be permitted to appear therein and defend.

The following are substantially the facts set out in the complaint: Adam Forner was the duly elected and qualified trustee of Adams township, Madison county, Indiana, and acted as such, from the year 1890 to August 8, 1895 and, *ex officio*, was the trustee of Adams school township during all of said period. That during the time he was acting as trustee, he executed and delivered, as such official, to one George W. Ray, a warrant on Adams school township for \$650.00, purporting upon its face to have been executed for certain apparatus and school supplies to be used in the public schools of that township. Subsequently Ray transferred the warrant to the defendant Irwin, who, as the holder thereof, on the 19th day of April, 1892, instituted an action in the Madison Circuit Court against said school township, and recovered a judgment therein against it, on default, for \$516.36. It is further averred that this judgment remains unappealed from and unpaid, and that the apparatus and supplies for which the warrant purported to have been executed, were not purchased by the trustee from Ray, and were not received by the township, nor used in the schools thereof, and that the warrant was executed and delivered by trustee Forney to Ray, pursuant to a corrupt and fraudulent bar-

Adams School Township v. Irwin.

gain and conspiracy by and between said Ray and Forney, whereby it was the purpose of said parties to defraud the township out of the amount of money mentioned in the warrant, and that Ray accepted the warrant and transferred it to the defendant Irwin without having sold or delivered any of the articles mentioned in said warrant to the school township. It is further alleged that the judgment was obtained upon the default of appellant to appear to said action. That Forney, who was the trustee at the time the action was instituted and when the judgment was rendered, had knowledge of all of the aforesaid facts, but that none of said facts were brought in any way to the attention of the court. That Forney concealed the same from the court, and permitted a judgment to be taken against the township by default, for the purpose, on his part, of practicing a fraud on the court, and that thereby a fraud was practiced on the court, and a judgment recovered by the defendant Irwin on the warrant, which, in his hands, was tainted with the fraud. There are facts averred tending to show that one Titus, who became the successor to Forney, in August, 1895, exercised diligence in instituting this action, after he became fully aware of the fact that the school supplies said to have been the consideration of the warrant in question had not been received or used by the township. There are no facts whatever tending to impute any fraud or misconduct to the appellee herein in obtaining the judgment against appellant—in fact, nothing of the kind is claimed by counsel for the appellant.

The attack made by the complaint on the judgment, seems to be upon the theory that the warrant, in the hands of the appellee, when he instituted his action therein, was tainted with the fraud of Ray and Forney, which led up to its execution, and of which it

♦ Adams School Township v. Irwin.

was the offspring, and that the latter practiced a fraud on the court by his failure to appear to the action as the representative of the township and inform the court of the fraud which he and his co-conspirator Ray had perpetrated on the township, and thereby defeat the appellee in his suit; and that his failure or neglect so to do resulted as a fraud upon the court, for the reason that by it not being apprised of the facts, which would have defeated a recovery on the fraudulent warrant, rendered the judgment thereon. Or, in other words, the essence or gist of the complaint seems to be that appellant was prevented from setting up the fraud or collusion between Ray and its trustee as a defense to the action, by reason of the latter's negligence or wilful failure to respond to the summons of the court, and appear in the name and on behalf of appellant, and inform the court of the facts in the case, and cause them to be interposed as a defense. It is not even shown that the appellee had any knowledge before, or when he commenced his action upon the warrant, or when the judgment was rendered, that it was impressed with fraud, or that any defense existed which would bar recovery thereon, or that he did anything which prevented appellant from availing itself of the defense in question, or in any manner imposed any fraud on it or the court, in obtaining his judgment.

The facts set up in the complaint fall short of showing in any manner that the appellee was guilty of any fraud or wrong, either in receiving the warrant from Ray, or in the proceeding wherein he recovered his judgment. Appellant seeks, on the ground of fraud, to invoke the equity powers of the court, in awarding the relief which it demands. As we have stated, there is an entire absence, under the facts, of any showing on the part of appellant, that the appel-

Adams School Township v. Irwin.

lee, as prevailing party in the suit wherein the judgment was obtained, was guilty of any fraud or conduct whereby the complaining party herein or the court rendering the judgment was imposed upon or misled. The complaint charges no collusion between the latter and appellant's trustee. It would seem that appellee commenced his action in the proper court, in the usual and ordinary way, by filing a complaint and procuring appellant to be duly notified of the pendency of the action by duly serving the proper process of the court on its trustee. We must at least presume this to be so, in the absence of any showing to the contrary, as the facts disclose that the judgment was taken on the default of appellant. The law required the process of the court to issue against the appellant, under the circumstances, as the school township, and to be served, as provided, on its trustee. Section 6027, Burns' R. S. 1894 (4536, R. S. 1881). *City of Huntington v. Day*, 55 Ind. 7; *Vogel v. Brown Township*, 112 Ind. 299; *Vogel v. Brown School Township*, 112 Ind. 317. We are therefore bound to presume that the court found that the law in this respect had been complied with before it gave judgment against appellant on default.

The vital question, under the circumstances, is: Does the complaint, which wholly fails to attribute any fraud or wrong to the appellee, state a cause of action, upon the theory on which it proceeds? The doctrine is universally recognized that a judgment obtained by fraud may be annulled, and courts of equity are invested with inherent powers, without regard to statutory provisions, to annul and vacate such judgments. It is also true that there are cases and circumstances under which such courts have exercised this power as to judgments rendered by mistake. *English v. Aldrich*, 132 Ind. 500. In the case

Adams School Township v. Irwin.

just cited, it is said: "While the court possesses this power, it will not in all cases be exercised. It should be exercised only in clear cases, where the party asking it is himself without fault, and where he proceeds without unreasonable delay after the discovery of the fraud or mistake."

Equity, however, will not interpose to relieve a complaining party from a judgment at law on the ground that he had a valid defense to the action wherein the judgment was rendered which was not interposed by reason of his own negligence. As a general rule, every person is required to look after his own rights, and to see that they are vindicated in due season, and in a proper manner; consequently, where a defendant has the proper means of a defense in his power, but neglects or fails to employ such means for that purpose, and suffers a judgment to be recovered against him in a proper tribunal, he is forever precluded. *Center Township v. Board, etc.*, 110 Ind. 579, and authorities there cited.

The fraud that will annul or vacate a judgment, is not that arising out of the facts which were actually or necessarily in issue in the cause in which it was rendered. The rule is that the fraud which vitiates a judgment, must arise out of the acts of the prevailing party, by which his adversary has been prevented from presenting the merits of his side of the case, or by which the jurisdiction of the court has been imposed upon. Or, in other words, the fraud relied on must relate to some act in securing jurisdiction, or as to something done concerning the trial, or the judicial proceedings themselves; and the rule has no application to cases of fraud in the transaction, or matters connected with it, out of which the legal controversy arose. *Bigelow on Frauds*, 170; *Black on Judgments*, section 370; *Sanders v. State*, 85 Ind. 318;

Adams School Township v. Irwin.

Freeman on Judgments, section 486; *Gray v. Barton*, 62 Mich. 186, 28 N. W. 813; Story's Eq. Jur. (10th ed.), sections 252 and 1575; *Zellerbach v. Allenberg*, 67 Cal. 296, 7 Pac. 908; *Stratton v. Allen*, 16 N. J. Eq. 229. Freeman, in the section above cited, states the rule as follows: "To entitle a party to relief from a judgment or decree, it must be made evident that he had a defense upon the merits, and that such defense has been lost to him, without such loss being 'attributable to his own omission, neglect, or default.' The loss of a defense, to justify a court of equity in removing a judgment, must in all cases be occasioned by the fraud or act of the prevailing party, or by mistake or accident on the part of the losing party, unmixed with any fault of himself or his agent."

Appellant is a public corporation with power to sue, and subject to be sued, and certainly the rule asserted by the authorities on the question involved is as applicable to a public corporation as it is to a private one, or to a natural person. Forney at the time appellee commenced his action to recover on the warrant, was the trustee of this school township, and, although not the township, he was at least its special agent, with limited statutory authority. Notice to him of the pendency of the action, in the manner provided by law, must be deemed notice to the township. When appellee instituted his suit on the warrant, and legally notified appellant through its proper agent of the fact, he thereby challenged it to respond in like manner as any other defendant would have been required, and assert any defense which it then had to the action. The discharge of this duty rested, under the law, on its trustee. This was within the scope of the power and authority of his agency, and this duty he, with full knowledge of the existing facts, neglected or failed to perform; consequently, the loss of appellant's de-

Adams School Township v. Irwin.

fense to the cause of action resulted from the negligent act of its own agent, and in no sense from any act or wrong of the appellee.

The contention of appellant's counsel that its hands, under the circumstances, were tied, and it could do nothing, if in a legal sense could be said to be true, may be met with the answer that this condition, in which it is said to have been placed, must be attributed to its own agent or representative, and in no way to appellee. The decision in the case of *Cicero Township v. Picken*, 122 Ind. 260, is an authority quite in point on the question here involved. That was an action to vacate a judgment obtained, as alleged, by fraud. It appeared that the judgment was rendered on a township warrant in a suit in which no summons had been issued. That a firm of attorneys, one of whom was a surety on the official bond of the township trustee, appeared in the action for the township, and filed an answer whereby the legality of the warrant in suit was admitted. That in fact, as averred, the said warrant was invalid by reason of its being issued in violation of law, as specified in the complaint, for which the trustee was liable on his bond, and that he was insolvent at the time the judgment was rendered, etc. This court, in an opinion affirming the judgment below, said: "It is not alleged that the appellant's trustee, and the appellees, had any understanding, or agreement, in reference to the institution of the action, or the appearance of the appellant without notice, and without such an averment we must infer that there was no such understanding; and, if not, the appellees cannot be made to suffer for what the appellant did, no difference what may have been the purpose of its agent having authority to act for it in the matter.

"It seems that one of the two attorneys who ap-

Adams School Township v. Irwin.

peared for the appellant, and filed its answer, was a surety on the bond of the appellant's then trustee, but it is not averred that the appellees knew that fact, or had anything to do with the selection of the attorneys who appeared for the appellant.

"Suppose it were conceded that the then trustee employed the attorneys who appeared to the action for the purpose of enabling the appellees to obtain judgment promptly, and without litigation, *but without knowledge on the part of the appellees that what was being done was not in good faith*, the appellees could not be prejudiced thereby; it not appearing that the court was in any way deceived by the action of those representing the appellant, and thereby induced to render a different judgment than it would otherwise have rendered. * * *

"There are no facts alleged tending to establish bad faith on the part of the appellees, either in the institution of their said action, or its prosecution to final judgment. If the contention of appellant's counsel can be maintained, judgments rendered against public corporations are of no binding force, and have no validity, if the corporation, as it turns out, could have successfully defended the action on the ground of want of power to enter into the obligation sued on." (Our italics.)

It may be said, perhaps, in passing, that the loss which appellant will sustain, if compelled to pay the judgment, will be the result, to an extent, at least, of its misfortune in having selected, through its legal voters, a man for its agent or representative, who, if the facts alleged are actually true, was recreant to his trust, and one ready and willing at the instigation of designing men to perpetrate a criminal wrong.

The complaint, for the reasons stated, is insufficient, and the demurrer therefore was properly sustained, and the judgment is affirmed.

The State v. The Ohio Oil Company.

THE STATE v. THE OHIO OIL COMPANY.

[No. 18,476. Filed March 10, 1898.]

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150	695
150	696
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INJUNCTION.—Action by State.—Demurrer.—To question the capacity of the State to maintain a suit for injunction, a demurrer should embrace the second statutory ground for demurring, to wit: "That the plaintiff has no legal capacity to sue." p. 27.

STATE.—Courts Open To.—The courts of the State and of the United States are open to the State, both in its sovereign capacity and by virtue of its corporate rights. pp. 27, 28.

NATURAL GAS.—Waste Of.—Constitutional Law.—Section 7510, Burns' R. S. 1894, providing that it shall be unlawful for any person, firm, or corporation operating a natural gas or oil well to permit the flow of gas or oil from such well to escape into the open air, is not unconstitutional as an unwarranted interference with private property, as the title to such gas or oil does not vest in any private owner until it is reduced to actual possession. pp. 28-32.

STATUTORY CONSTRUCTION.—Scope of Statute.—Preamble.—If, on review of the whole act, a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it, notwithstanding the less extensive import of the preamble. pp. 32, 33.

NATURAL GAS.—Waste Of.—Statute Construed.—Section 7510, Burns' R. S. 1894, making it unlawful "to permit the flow of gas or oil from any such well into the open air," applies to the waste of gas from wells producing both gas and oil. p. 34.

SAME.—Waste Of.—Nuisance.—Injunction.—In a suit by the State to enjoin an oil company from wasting natural gas, the complaint alleged that a large number of the people of the State were almost wholly dependent upon such gas for fuel supply; that the State relying upon the permanent supply of gas, had equipped many public buildings and institutions for the use of natural gas as fuel; that defendant, in the operation of certain wells producing both gas and oil, has permitted large quantities of gas to escape and become wasted, and avows its purpose to continue so to permit the escape of such gas; that the statutory penalties for the wasting of gas are wholly inadequate, and that the wrongful and unlawful conduct of defendant, if suffered to continue, will be irreparable. Held, that the facts stated in the complaint make a case of public nuisance which the State has a right to have abated by injunction. pp. 35-46.

From the Madison Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, Merrill Moores,
D. W. Scanlan, M. A. Chipman, S. M. Keltner, E. E.

The State v. The Ohio Oil Company.

Hendee, F. Winter and Blacklidge & Shirley, for appellant.

R. R. Stephenson, Geo. Shirts, W. R. Fertig and M. F. Elliott, for appellee.

MCCABE, J.—The State of Indiana, by her Attorney-General and the prosecuting attorney of the Madison Circuit Court, brought suit against the appellee, the Ohio Oil Company, seeking to enjoin it from wasting natural gas. The circuit court sustained the defendant's demurrer to the complaint for want of sufficient facts to constitute a cause of action, and the plaintiff, electing to abide said demurrer, and refusing to amend its complaint or to plead further, the court rendered judgment that the plaintiff take nothing by its complaint and that defendant recover costs. Upon this ruling alone the State assigns error.

The substance of the complaint is, that for many years heretofore there has been underlying Madison, Grant, Howard, Delaware, Blackford, Tipton, Hamilton, Wells, and other counties in Indiana, a large deposit of natural gas, utilized for fuel and light by the people of those counties and of many other counties and cities in Indiana, including Indianapolis, Ft. Wayne, Richmond, Logansport, Lafayette and others of the most populous cities of the State, to which cities the gas is conducted, after being brought through wells to the surface of the ground, by pipes and conduits, by means of which many hundreds of thousands of the people of Indiana are supplied with gas for light and fuel. The natural gas underlying the counties named, and other portions of Indiana, is contained in and percolates freely through a stratum of rock known as "Trenton Rock," comprising a vast reservoir in which the gas is confined under great pressure, and from which it escapes, when permitted to do so, with great force. The fuel supplied by the natural gas

The State v. The Ohio Oil Company.

thus obtained is the cheapest and best known to civilization, and the value of the natural gas deposit to the State and its citizens is many millions of dollars. Since the discovery of the gas deposit in 1886, vast sums of money have come into the State, and have been invested in building up large manufacturing interests, and vast sums of money belonging to the people of Indiana have been invested in similar enterprises, causing a great increase of population, principally in the territory underlying which gas is found. Many cities in and adjacent to the gas territory, including those named, are almost wholly dependent for fuel supply upon natural gas, and for that reason the people of Indiana have become and are greatly interested in the protection and continued preservation of the gas supply. Many millions of dollars invested in manufacturing and other properties in and near the gas territory are wholly dependent for their continued operation and for the permanent value of their property upon the gas supply. Their location and establishment in the gas territory was due to the presence of natural gas underlying it, without which such enterprises could not be operated at a profit, and in the event that the supply of gas is exhausted in the territory, many of such manufacturing enterprises (in which thousands of citizens of Indiana find employment at remunerative wages) will be compelled to suspend operations. Their employees will be thrown out of employment, and many of them, being wholly dependent upon their labor for support, may and will become charges upon the State and its municipal subdivisions. The property of the manufacturing enterprises and the vast investments depending on them and related to them will become worthless, and the owners will be driven to remove to other parts of the country, taking away from Indiana great wealth now

The State v. The Ohio Oil Company.

invested in these enterprises. In the cities named, and in all the territory known as the "Gas Belt," the inhabitants have for years used practically no other fuel than natural gas. Their houses in many instances, are constructed with a view to the use of natural gas, and will have to be differently equipped before other kinds of fuel can be used. The cost of natural gas as fuel to the people in the gas belt, who number several hundreds of thousands, is very much less than that of any other fuel that has ever been, or can be procured by them, and to the other inhabitants of the State using natural gas it has become and is a source of great convenience, comfort, and increased happiness because of its cheapness, convenience, and cleanliness as fuel. Many small villages in and near the gas territory have within a few years become flourishing and opulent cities. The State's wealth and its revenues derived from taxation on account of such increased population and the various interests that have been fostered and supported by natural gas have been greatly increased, and will, in the event gas is exhausted, be correspondingly curtailed. The State of Indiana, relying upon the permanent supply of gas, has, at great expense, equipped many of its public institutions, including the State-house, the Central and other hospitals for the insane, the asylums for the blind and deaf and dumb, the institution for the care of the orphans of American soldiers and sailors, and other public institutions, owned and maintained by the State of Indiana and its various subdivisions, together with the court-houses in many counties, and a vast number of public schools, for the use of natural gas as fuel, by which the cost of maintaining the public buildings and institutions named has been materially lessened, and the comfort and happiness of their inmates and occupants immensely increased. Natural gas exists

The State v. The Ohio Oil Company.

in large reservoirs, or a series of reservoirs connected with each other, underlying the gas territory, and the diminution or consumption of natural gas taken from any part of them affects or reduces correspondingly the common supply. If the gas supply is accordingly husbanded and protected it will last for many years, and continue to supply the various interests named with abundant fuel, and the population, wealth, and other material interests of the State will continue to be benefited and enhanced, and the comfort, enjoyment, and happiness of the people of the State greatly increased.

It is charged that about May 25, 1897, the Ohio Oil Company, an Ohio corporation, as its name implies, caused a well to be drilled near Alexandria, Madison county, which produces natural gas and petroleum in large quantities. The location of this well is described, as well as that of five other wells drilled at about the same time as the one first named, all of which produce both natural gas and petroleum, and have done so ever since their completion. It is charged that, instead of securely anchoring the wells as drilled, so as to confine the gas produced by them within two days next after their completion, the defendant, ever since the completion of the wells, which have been completed for some time, has "unlawfully permitted the gas produced therein to flow and escape into the open air, whereby many millions of cubic feet of natural gas have been wasted and lost, and whereby the State's supply of natural gas has been greatly diminished, and the property of its citizens within the said gas territory dependent upon the continued supply of natural gas for fuel as aforesaid, has been greatly damaged and decreased in value." It is also charged that the defendant avows its purpose to permit the gas to escape continuously and indefi-

The State v. The Ohio Oil Company.

nately hereafter from said wells, and refuses to make any effort to confine it, and declares its purpose to drill other wells in the gas territory, and permit the gas therefrom to flow and escape into the open air, and that if the gas continues to flow from the wells, the supply of natural gas upon which the citizens of the State depend will be greatly diminished; that the pressure of gas as found in said Trenton rock will be greatly diminished, and that by the diminution of such pressure, water will accumulate in the rock stratum and ultimately and entirely displace and overcome the gas supply; that because of the wrongful acts of the defendant above described, heretofore committed and now continuing, its property and that of its citizens has been and will continue to be essentially interfered with, and the comfortable enjoyment of the lives of its citizens greatly interrupted. And plaintiff avers "that it has no adequate remedy at law for the redress of its grievances complained of; that it is impossible accurately to fix in dollars and cents the damage the plaintiff has sustained and will sustain by reason of the wrongful and unlawful acts of the defendant, if suffered to continue, and that the plaintiff's injuries on account thereof are and will be great and irreparable, and increase as said gas is permitted to flow, and the number of wells wherein the same is unconfined continues to increase; and that the ordinary remedies, though repeatedly resorted to by plaintiff, have proved ineffectual to restrain or check the wrongful action of defendant."

It is charged that the penalties provided by law for the unlawful acts above described are wholly inadequate, and that the defendant has openly defied, and continues to defy, the lawfully constituted authorities of the State in their efforts to enforce and recover in the name of the State the penalties provided by law

The State v. The Ohio Oil Company.

for such wrongful acts committed by the defendant, and that injunctive relief is necessary in order to restrain the continued wrongful acts of the defendant, and that, unless the same is given, one of the greatest natural resources of the State will be ultimately destroyed; that, in order to obtain even a partial and inadequate remedy for the wrong done, a multiplicity of suits must be resorted to, entailing great expense, and affording no considerable relief, unless the defendant is restrained and prohibited by injunction from doing the things complained of.

It is therefore prayed that upon final hearing the defendant and its agents, servants, and employes be perpetually enjoined and prohibited from further suffering or permitting the natural gas produced in said wells, or any of them, to escape from them, and that the defendant be ordered and directed forthwith to securely confine the same, either by anchoring each of the wells, or by confining the gas in tanks, pipes or other proper receptacles, and that failing to do so, the sheriff of Madison county be ordered to anchor, secure and confine the natural gas in each of said wells, and that the expense of such anchoring be taxed as part of the costs of suit.

It is intimated by appellee's learned counsel that the State has no right to maintain such a suit, but whether it be on account of lack of capacity to sue, or simply because the complaint does not state facts sufficient, is not made plain by the argument of appellee's counsel. If it was the intention to question the capacity of the State to sue, counsel should have embraced in the demurrer the second statutory ground for demurring, namely: "That the plaintiff has not legal capacity to sue." Section 342, Burns' R. S. 1894 (339, R. S. 1881).

But the courts of the State and United States are

The State v. The Ohio Oil Company.

open to the State, both in its sovereign capacity and by virtue of its corporate rights, in both of which characters it sued here. *Indiana v. Kentucky*, 136 U. S. 479; *Indiana v. Woram*, 6 Hill 33, 40 Am. Dec. 378; *State v. Portsmouth Savings Bank*, 106 Ind. 435; *State v. Adams Express Co.*, 144 Ind. 549; *Adams Express Co. v. Indiana*, 165 U. S. 255; *State v. Chicago, etc., R. R. Co.*, 145 Ind. 229; *State v. Union Nat'l Bank of Muncie*, 145 Ind. 537; *Western Union Tel. Co. v. State*, 146 Ind. 54; 23 Am. & Eng. Ency. of Law, p. 80.

The appellee contends that "the question of the exhaustion of the gas is certain according to the averments in both the injunction cases, and the question, therefore is, who shall be permitted to exhaust it." "The State contends," says appellee, "that the manufacturers and gas companies shall be allowed that privilege for the purpose of bargain and sale, although it incidentally avers benefit to the people, and all this to the exclusion of an oil company which is also using gas for the purpose of a legitimate business. In such matters of private concern the State has no interest and should not have any."

It is true the production of oil is a legitimate business, but the waste and destruction of natural gas, which appellee's demurrer admits it is engaged in, defiantly, constantly, and in utter contempt of the laws of Indiana, and the welfare and comfort of its citizens, is not only not a legitimate business, but has been placed under the ban of two prohibitory statutes in this State. Sections 2316-2318, Burns' R. S. 1894 (Acts 1891, p. 55); section 7510, Burns' R. S. 1894 (Acts 1893, p. 300). Section 1 of the latter act provides: "That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee,

The State v. The Ohio Oil Company.

agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle for a longer period than two (2) days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles." The constitutionality of the latter act is assailed by the appellee. But the former act, being very much of the same nature as regards its constitutionality as the latter, was assailed by the appellant in *Townsend v. State*, 147 Ind. 624, for every conceivable constitutional objection, and for every objection urged to the act now under consideration, and this court in that case upheld the constitutionality of that act.

It is asserted with great confidence that the gas in or under the appellee's land is a part of the land, and that it is a reasonable use thereof to mine for the oil therein, even though gas is thereby incidentally wasted by permitting its escape into the open air; and that a statute prohibiting such a reasonable use is unconstitutional. And several Pennsylvania and Ohio cases are cited, together with one from New York, and one in West Virginia, to the effect that petroleum is a mineral, and while it is in the earth it is a part of the realty; and that when it reaches a well, and is produced on the surface, it becomes personal property and belongs to the owner of the well. It is therefore argued that natural gas is likewise a part of the land in or under which it is found, and that the owner of the land may and has a lawful right to assert absolute dominion over all that is found in or under his land, to the center of the earth, and for an unlimited distance upwards from the surface. The force of these authorities depends entirely upon the

The State v. The Ohio Oil Company.

analogy between oil or petroleum and natural gas in or under the land. It must be confessed that there is a marked difference between these two substances in their nature. This court has likened natural gas as to its property characteristics to fish in the waters and wild game in the forest before taken and reduced to possession. *Townsend v. State, supra*, and cases there cited. But appellee's learned counsel rely on a quotation made by this court in the latter case from the Pennsylvania supreme court, and which had in a gas case been previously quoted by this court. *People's Gas Co. v. Tyner*, 131 Ind. 281. That quotation is as follows: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' * * * They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant owner drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours but his." The part of this quotation that seems favorable to appellee's contention is this: "They [the water, gas, and oil] belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone." This much of the quotation was not

The State v. The Ohio Oil Company.

adopted as law by this court in either of the cases in which the quotation is found. On the contrary, in the latter case, this court said: "By the Tyner case, 131 Ind. 281, 282, this court likened natural gas and laws regulating the same to wild animals and laws regulating the taking of such animals. The supreme court of Minnesota in *State v. Rodman*, 58 Minn, 393, 59 N. W. 1098, having under consideration the constitutionality of a certain game law of that state, said: 'We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietor, but in its sovereign capacity as the representative, and for the benefit, of all its people in common. The preservation of such animals as are adapted to consumption as food, or to any other useful purpose, is a matter of public interest; and it is within the police power of the State, as the representative of the people in their united sovereignty, to enact such laws as will best preserve such game, and secure its beneficial use in the future to the citizens, and to that end it may adopt any reasonable regulations, not only as to time and manner in which such game may be taken and killed, but also by imposing limitations upon the right of property in such game after it has been reduced to possession.' " And this court in the same case also likened natural gas and its characteristics as property to fish and the laws regulating the taking thereof. There is no such thing in such laws, either as to wild animals or fish, to the effect that they become the property of the owner of the land on which the animals are found, or in the waters of which the fish are found. And there is no such thing in such laws to the effect that after title has once vested by actual reduction to possession, that the same may wander off and vest in some one else. To say that the title to natural gas

The State v. The Ohio Oil Company.

vests in the owner of the land in or under which it exists to-day, and that to-morrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd and contrary to all the analogies of the law, than to say that wild animals or fowls in "their fugitive and wandering existence," in passing over the land, become the property of the owner of such land, or that fish in their passage up or down a stream of water become the property of each successive owner over whose land the stream passes. It is as unreasonable and untenable as to say that the air and the sunshine which float over the owner's land is a part of the land, and is the property of the owner of the land. We therefore hold that the title to natural gas does not vest in any private owner until it is reduced to actual possession, and therefore that the act from which we have quoted is not violative of the constitution, as an unwarranted interference with private property.

But appellee's counsel contend that a proper construction of the act makes it wholly inapplicable to the subject of this suit, the prevention of the waste of gas. That it does not apply to a well unless it endangers persons or property. It is not in the language of the act that counsel claim to find this meaning, but they claim to find it in the preamble thereto, reading thus: "Whereas, great danger to life and injury to persons and property is liable to result from the improper, unsafe and negligent sinking, maintenance, use and operation of natural gas and oil wells; therefore," etc. It is not claimed, as it cannot with reason be, that the language of the act is either ambiguous or doubtful in its meaning. It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief re-

The Slate v. The Ohio Oil Company.

cited. The evil recited is but the motive for legislation, the remedy may both consistently and wisely be extended beyond the cure of that evil; and if, on review of the whole act, a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it, notwithstanding the less extensive import of the preamble. 23 Am. and Eng. Ency. of Law, 331, 332, and authorities there cited; *Holbrook v. Holbrook*, 1 Pick, 251; *Erie, etc., R. R. Co. Casey*, 26 Pa. St. 288; *Yazoo, etc., R. R. Co. v. Thomas*, 132 U. S. 174; *Hughes v. Done*, 1 Q. B. (1 A. & E. N. S.) 301. In *Yazoo, etc., R. R. Co. v. Thomas, supra*, the Supreme Court of the United States said: "The preamble to the act is referred to by counsel, as sustaining their construction, because it is therein declared that the work is one of 'great public importance,' and 'to be encouraged by legislative sanction and liberality' and that 'the physical difficulties of constructing and maintaining railroads to, across, along, or within either the Mississippi, Sunflower, Deer Creek, or Yazoo bottoms or basins, or other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches, developing said basins and alluvial lands, and connecting them with the railroad systems of the country.' But as the preamble is no part of the act, and cannot enlarge or confer powers nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up." We have no doubt, from the language of the act, and the circumstances surrounding its enactment, that the chief object in the passage thereof was to prevent the waste of natural gas. 23 Am. and Eng. Ency. of Law, 335, 336; *Edger*

The State v. The Ohio Oil Company.

v. Board, etc., 70 Ind. 331; *Stout v. Board, etc.*, 107 Ind. 343; *May v. Hoover*, 112 Ind. 455; *Hunt v. Lake Shore, etc., R. W. Co.*, 112 Ind. 69.

It is next contended that the act does not apply to appellee's case, because it was intended, as is claimed, to apply only to wells producing oil alone, and to wells producing gas alone, and not to what counsel call combination wells, producing both oil and gas, as is the case with appellee's wells, as disclosed in the complaint. At the time of the passage of the act, the chief waste of natural gas which was going on, and had been for some time, as shown by the Eleventh Annual Report of the United States Geological Survey for 1889-1890, and the current history of the times, resulted from what counsel term combination wells, producing both oil and gas. The waste from wells producing gas alone was small in comparison with that from such combination wells. In the light of these historical facts it would be extremely absurd to suppose that the legislature intended to prevent waste only by closing the spigot and leaving the bung wide open. But even the language of the statute forbids such construction. The act made unlawful, by the express words of the section quoted, is: "to allow or permit the flow of gas or oil from any such well to escape into the open air." In this sentence there is but one well spoken of. The prohibition is against the escape of gas, and it is undeniable that it is equally against the escape of oil, and it is equally clear that the prohibition against the escape of both relates to the same well; and therefore, if they are both permitted to escape from the same well, the permission of the escape of each is made unlawful by the section quoted. Had the statute made the violation thereof a crime, would any rational being contend that an indictment charging the accused with permitting both oil and gas

The State v. The Ohio Oil Company.

to escape from such well would not be good? Certainly not.

It is next contended that there is no authority or right of action in the State at common law, and especially that the State cannot maintain a suit in equity, either under the statute or at common law. This being a suit in equity, as the law existed prior to the adoption of the civil code of 1852, if the objection last mentioned be well taken, it is fatal to the complaint. The reason assigned in argument why the State cannot maintain the action for an injunction is that the statute provides a different remedy, namely, the recovery of a penalty of \$200.00 for each violation of the act, and a further penalty of \$200.00 for each ten days during which such violation shall continue, to be recovered in a civil action in the name of the State, for the use of the county in which such well is located, with attorney's fees and costs of suit. And another remedy provided in another section of the act is that certain persons in the vicinity are authorized to go upon the land where any well is situated from which gas or oil is allowed to escape in violation of the act, and shut up the same, and pack and tube said well so as to prevent the escape of gas or oil, and maintain a civil suit against the owner for the costs of such closing of said well, with attorney's fees and costs of suit. But this court has gone much further than to hold that the fact that the civil remedy given to recover penalties and the other remedies for violation of the act, does not bar the right to an injunction. In the case of the *Peoples Gas Co. v. Tyner, supra*, it was said: "No authority has been cited, and we know of none, supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitroglycerine within the corporate limits of a town or city is

The State v. The Ohio Oil Company.

a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself and not sustained by the public in general." In that case it was held that the extraordinary equitable remedy by injunction could be invoked by a private citizen, even though the act to be enjoined was made a crime by statute. And the same rule was applied in the *Columbian Athletic Club v. State, ex rel.*, 143 Ind. 98, where this court said: "Extraordinary emergencies in many cases call for extraordinary remedies. * * * The rule to be observed in such cases is quoted at page 366 from Lord Chancellor Cottenham, 'That it is the duty of the courts of equity (and the same is true of all courts and all institutions) to "adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy.'" This rule, the author [Judge Redfield] concludes, is certainly worthy of one of the ablest, wisest, and best judges that ever administered the chancery law of England or America." Our code provides that "whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life and property, is a nuisance, and the subject of an action. * * * The nuisance may be enjoined or abated and damages recovered therefor." Sections 290, 292, Burns' R. S. 1894 (289, 291, R. S. 1881). The facts alleged in the complaint show that the acts of the appellee are such as to essentially interfere with

The State v. The Ohio Oil Company.

the comfortable enjoyment of life and the property of the citizens of the State

The supreme court of Kansas, in *State v. Crawford*, 28 Kansas, 726, said: "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated, is a public nuisance." The demurrer to the complaint admits that the wells of the appellee are in this category.

The supreme court of California, in a suit by the attorney-general to enjoin the Truckee Lumber Company from discharging sawdust into the Truckee River with the effect of destroying the fish therein, in sustaining the action, which is closely analogous to this action, the court used the following language, which we adopt: "It is alleged that the acts of defendant have the effect of polluting and poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is 'an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life and property by an entire community or neighborhood, or any considerable number of persons,' is a public nuisance. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the State (*Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. 129), as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union. The complaint shows that by the repeated and continuing acts of defendant this public property right is being and will continue to be greatly interfered with and

The State v. The Ohio Oil Company.

impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question. (*People v. Elk River, etc., Co.*, 107 Cal. 219, 40 Pac. 486, 48 Am. St. 121.) * * *

"The dominion of the State, for the purpose of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, is not confined within the narrow limits suggested by the defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. * * *

"While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. * * *

"The fact that acts of the character alleged are by the penal code made a misdemeanor, and punishable as such, does not make them less a nuisance, nor imply that the legislature intended to make the criminal remedy exclusive of the civil. Nor is there anything in the objection that the attorney-general is not privileged to maintain the action upon his own information, without the intervention of a private relator." *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374. The same doctrine is laid down in *People v. City of St. Louis*, 10 Ill. 351; *Commonwealth v. Pittsburgh, etc., R. Co.*, 24 Pa. St. 159; *State v. Metschan (Or.)*, 46 Pac.

The State v. The Ohio Oil Company.

791. In *Commonwealth v. Pittsburgh, etc., R. R. Co.*, *supra*, it was said: "The matter complained of is an invasion of a public highway, and it must be enjoined against. The defendants are not allowed the excuse that this part of the canal is practically abandoned; for no neglect is chargeable against the state; its officers are insisting on its rights, and it is the merest effrontery in the defendants to set up their views of the need of the canal against the state which thought fit to make it, and against the public officers who are entrusted with its custody. * * * It is therefore ordered that an injunction issue."

The state of South Carolina brought suit in one of its courts to enjoin the Coosaw Mining Company from digging, mining or removing phosphate rock and phosphatic deposits from the bed of the river. On petition of the Mining Company the case was removed into the circuit court of the United States. From the decree of that court the Mining Company appealed to the Supreme Court of the United States. That court, in affirming the judgment of the circuit court, awarding an injunction, said: "An instructive case upon this subject is *Attorney-General v. Jamaica Pond Aqueduct*, 133 Mass. 361, 364. That was an information in equity, in the name of the Attorney-General, to restrain a corporation from doing certain illegal acts, the necessary effects of which would be not only to impair the rights of the public in the use of one of the great ponds of Massachusetts for the purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores slime, mud, and offensive vegetation detrimental to the public health. It was held, upon the authority of numerous cases, American and English, that where the nuisance is a public one, an information by the Attorney-General was the appropriate remedy. After ob-

The State v. The Ohio Oil Company.

serving that the preventive force of a decree in equity, restraining the illegal acts before any mischief was done, would give a more efficacious and complete remedy than an indictment, or proceeding under a statute for the abatement of the nuisance, the court said: 'There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide water and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. * * * If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the Attorney-General to restrain and prevent the mischief.' So, in *Eden on Injunctions*: 'The usual, and perhaps the more correct mode of proceeding in equity in cases of public nuisance is by information at the suit of the Attorney-General,' p. 267. Mr. Justice Story said that an information in equity at the suit of the Attorney-General would lie in cases of purpresture and public nuisance, the jurisdiction of courts of equity being sustained because of 'their ability to give a more complete and perfect remedy than is attainable at law in order to prevent irreparable mischief, and also to suppress oppressive and vexatious legislations.' *Eq. Jur.*, sections 922, 923, 924; *People v. Vanderbilt*, 26 N. Y. 287; *District Attorney v. Lynn, etc., R. R. Co.*, 16 Gray 242, 245; *Kerr on Injunctions*, 262, 263; 1 *Joyce on Injunctions*, 120.

The State v. The Ohio Oil Company.

"These principles are applicable to the present case. The remedy at law for the protection of the State in respect to the phosphate rocks and phosphatic deposits in the beds of its navigable waters is not so efficacious or complete as a perpetual injunction against interference with its rights by digging, mining, and removing such rocks and deposits without its consent. The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust, for an indefinite period, by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law, as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the State of the digging, mining and removing of phosphate rock and phosphatic deposits in the bed of the Coosaw River. Such security was properly given by the decree below. Decree affirmed." *Coosaw Mining Co. v. South Carolina*, 144 U. S. 566.

Accordingly, in *Cranford v. Tyrrell*, 128 N. Y. 344, 28 N. E. 515, it was held: "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner." And in *Port of Mobile v. Louisville, etc., R. R. Co.*, 84 Ala. 115, 126, 4 South. 106, it was held that: "The mere fact that an

The State v. The Ohio Oil Company.

act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

It has been held that the United States in its sovereign capacity may enjoin hydraulic mining to the detriment of navigable streams. *United States v. North Bloomfield Gravel Mining Co.*, 81 Fed. 243. In a case where the state officers failed to enforce the law against brokerage in railroad tickets, the railroads brought suit in the circuit court of the United States to enjoin the brokerage business as unlawful. The circuit court of the United States for the middle district of Tennessee granted an injunction, and in answering the objection that such a proceeding was novel and unprecedented, said: "I return now to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well known history of the subject. Of course, this contention has been overruled, and precedent after precedent established from time to time to meet new conditions and to do full justice, until the argument has long since lost most of its force, although it is still maintained in form. It has been in answer to arguments like this that the

The State v. The Ohio Oil Company.

great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion regulated by analogy, by what would be manifestly just in view of all existing conditions, and requiring as a condition that there is no adequate remedy at law. Beyond this the courts have not gone, in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect to the right and the remedy, is progressive, that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy, and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civilization. A similar objection that novel use was being made of the writ of injunction was pressed in the case of *Toledo, A. A. & N. M. R. W. Co. v. Pennsylvania Co.*, 54 Fed. 751, and was answered by the court as follows: 'Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficial results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief. Mr. Justice Brewer, sitting in the Circuit

The State v. The Ohio Oil Company.

Court for Nebraska, said: "I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand." Mr. Justice Blatchford, speaking for the Supreme Court, in *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, said: "It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation."'" *Nashville, etc., R. W. Co. v. M'Connell*, 82 Fed. 76. To the same effect is our own case of *Columbian Athletic Club v. State, ex rel., supra*.

[It is true that as a result of the principles announced in the previous part of this opinion, natural gas, when reduced to actual possession of the landowner, when drawn into his well, pipes, tanks, or other receptacles thereby becomes his personal property, subject to his dominion. But, as said by this court in *Peoples Gas Co. v. Tyner, supra*: "The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others."] -

Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be

The State v. The Ohio Oil Company.

true by its demurrer, ought not to complain of being branded as the enemy of mankind. But appellee tries to excuse its conduct on the score that it cannot mine and utilize oil under and in its land without wasting the gas. But there is nothing in the record to bear out that claim. [However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy if that inhibition is to prevent, if possible, the exhaustion of the storehouse of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well-being of society than any other of the bounties of the earth. Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But, even if it can not draw oil from such wells without wasting gas, and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many *quasi* public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of

Davis *et al.* v. The Union Trust Company, Administrator.

very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana, and, in effect, says: "It is my property, to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana help yourselves if you can. What are you going to do about it?"

We had petroleum oil for more than a third of a century before its discovery in this State, imported from other states, and we could continue to do so if the production of oil should cease in this State. But we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action. Hence, the circuit court erred in sustaining appellee's demurrer to the complaint. The judgment is reversed, and the cause remanded, with instructions to overrule said demurrer, and require the defendant to answer the complaint, and for further proceedings in accordance with this opinion.

DAVIS ET AL. v. THE UNION TRUST COMPANY,
ADMINISTRATOR.

[No. 18,015. Filed March 15, 1898.]

APPEAL.—*Bill of Exceptions.*—*Longhand Manuscript of Evidence.*—

The record must affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office prior to the time that it was incorporated in the bill of exceptions. *p. 48.*

SAME.—*Record.*—*Deficiency of, Not Cured by Agreement of Parties.*

—All cases in the Supreme Court are heard and determined by the record, and no deficiency in the record can be supplied by the agreement of the parties. *pp. 49-52.*

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150	107
151	538

Davis et al. v. The Union Trust Company, Administrator.

From the Marion Circuit Court. *Affirmed.*

S. N. Chambers, S. O. Pickens and C. W. Moores,
for appellants.

John B. Sherwood, for appellee.

JORDAN, J.—This suit was commenced by the appellee against appellants, Mark C. Davis and wife, to foreclose a mortgage executed by them to John Lehman, appellee's decedent. The complaint averred that, at the date of the death of the said decedent, the note and mortgage in suit were in his possession; but since his death said instruments had been lost, stolen, or mislaid, and that they cannot be found by the plaintiff, after making diligent search, etc. The defendants answered the complaint, first, by a general denial; second, plea of payment. The defendant, Mark C. Davis, also filed a cross-complaint, wherein he alleged payment of the mortgage debt, and demanded that the note and mortgage be adjudged satisfied, and ordered to be canceled. A trial resulted in a finding by the court in favor of appellee upon the issues joined, and, over appellant's motion for a new trial, a judgment was rendered in favor of appellee for \$2,039.84, and for a foreclosure of the mortgage in suit. To review this judgment appellants prosecute this appeal.

All of the questions presented for review and consideration depend upon an examination of the evidence given in the case, and at the very threshold we are confronted with the proposition that the evidence is not properly and legitimately before us; and if this fact shall prove to be true, we will necessarily be compelled to dismiss the contentions of appellants' learned counsel relative to the errors attributed to the trial court, without giving the same any consideration upon their merits.

Davis *et al.* v. The Union Trust Company, Administrator.

There was an attempt on the part of the appellant to have the longhand manuscript of the evidence incorporated into a bill of exceptions, and certified to this court, in accordance with the provisions of the statute appertaining to and authorizing such procedure. Counsel for appellee, in his brief filed January 2, 1897, insists that the bill of exceptions purporting to embrace the evidence introduced on the trial below is open to several objections, one of which is that it does not appear that the longhand manuscript of the evidence was filed in the office of the clerk before it was incorporated into the bill of exceptions. This case has been pending in this court since July 3, 1896, consequently is subject to the law as it then existed relative to making the evidence a part of the record upon appeal to this court. It is shown by the certificate of the clerk of the lower court, which seems to have been made on November 10, 1896, in response to a writ of *certiorari*, that the longhand manuscript of the evidence was filed in his office on June 2, 1896, tions; or, in other words, the clerk's certificate ex- after it had been incorporated into the bill of excep- pressly discloses that the manuscript of the evidence was filed on the same day that the bill of exceptions purporting to embrace it was filed, but that said manu- script was not filed prior to its being incorporated into said bill of exceptions. We are therefore, in ac- cordance with the many decisions of this court which have interpreted the statute authorizing the original longhand manuscript of the evidence in a case to be certified to this court on appeal in lieu of a transcript, constrained to hold that the provisions of said statute have not been complied with; consequently, the evi- dence is not properly in the record. *Campbell v. State*, 148 Ind. 527; *Yellow Hammer, etc., Co. v. Carlin*, 148 Ind. 68; *Pruitt v. Farber*, 147 Ind. 1.

Davis et al. v. The Union Trust Company, Administrator.

On the 11th day of February, 1897, appellants filed in the office of the clerk of this court an instrument in writing, wherein, among other things, they and appellee stipulate and agree as follows: "It is agreed, to save the great expense of bringing up a transcript of the bill of exceptions filed in the office of the clerk of the Marion Circuit Court on the 2nd day of June, 1896, to which the appellants are entitled, that the bringing of such transcript is here and now by the appellee waived, and it is agreed that the longhand manuscript of the shorthand notes taken by the official stenographer on the trial of said cause, the same having been approved and signed by the Honorable Edgar A. Brown, judge of the Marion Circuit Court, and filed in the office of the clerk of the Marion Circuit Court on the 2nd day of June, 1896, which said bill of exceptions is now a part of the transcript on file in this court, may be taken in lieu of said transcript. It is the express intention of this agreement to waive, on the part of the appellee, the point made in its said brief as to said longhand manuscript not being filed in the office of the clerk prior to its incorporation in said bill of exceptions."

It certainly must be evident, in the light of the fundamental rules of appellate procedure, that parties to an appeal in this court cannot, by a mere agreement of the character of the one in question, inject into, or bring proceedings of the lower court into, the record in this court, when otherwise, under the law, they are no part of said record. Section 661, Burns' R. S. 1894 (649, R. S. 1881), provides as follows: "Upon the request of the appellant, or upon being served with notice as aforesaid, and, in either case, upon the payment of the proper fee, the clerk shall forthwith make out and deliver to the party, at his request, or trans-

Davis *et al.* v. The Union Trust Company, Administrator.

mit to the clerk of the supreme court, a transcript of the record in the cause, or so much thereof as the appellant, in writing, directs, certified and sealed, to which shall be appended the written directions of the appellant above contemplated, if any."

As a general rule, this tribunal derives its powers or rights to consider and determine a case according to methods prescribed by the law, and not by virtue or reason of any agreement of the parties to the appeal. All cases in this court are tried by the record. It furnishes the only evidence to sustain the alleged errors of the trial court of which a party complains. Appeals are heard by the record as legitimately constituted, and by such record all questions are tried and determined, and no deficiency therein, as in the one in the case at bar, can be supplied by the agreement of parties. *Campbell v. State, supra*; Elliott's App. Proc. 186, 187; *Blair v. Curry, post*, 99, and cases there cited; Weeks on Attorneys (2d ed.), section 236a.

It was the duty of appellants to furnish this court with a correct, complete, and orderly arranged and properly authenticated transcript of the record or proceedings of the lower court, except as otherwise provided by law, or, at least, so much thereof as was necessary to present the questions which they desired reviewed or considered. Such a transcript constitutes the record in this court, and it is important that it be made by the method provided by law, and be correct in every respect, as we must accept it as importing absolute verity.

The original longhand manuscript of the evidence when properly incorporated into a bill of exceptions and certified to this court according to the requirements of the statute is a substitute for a copy or transcript of the bill of exceptions filed in the lower court, embracing the evidence in the cause. If appellants have

failed to bring the evidence into the record in this case by reason of their not complying with the statute relative to shorthand reports of evidence, they are certainly, in order to make it available in this appeal, required to do so by procuring the clerk of the lower court to copy the bill of exceptions embracing the evidence, and have such transcript thereof certified up in the manner provided by the law pertaining to appeals to this court.

The phrase "transcript of the record," as employed by the statute in section 661, *supra*, certainly means what the term "transcript" denotes—a copy of the original. While it is true that the transcript of the record below exhibits to us the original papers, entries and proceedings, etc., in the case in the lower court, it does so, however, by simply exhibiting copies thereof, and by this method or means such copies are recorded, and compose the record in the cause in this court. It was held in *Carlson v. State*, 145 Ind. 650, that instructions given to the jury could not be incorporated into the bill of exceptions along with the stenographer's report of the evidence, and certified, without being copied by the clerk of the trial court. In *Blair v. Curry*, *supra*, we held that the stipulation or agreement of the parties to the appeal, waiving the deficiencies in the record, could not be considered, and that a bill of exceptions, after it has been filed, could not be amended by agreement. In *Manns Bros. Boot, etc., Co. v. Templeton*, 149 Ind. 706, it is held by this court that the rule which requires the clerk to dismiss an appeal when the appellant has failed to file his brief therein within sixty days after submission could not be waived by the agreement of the parties.

As said, the law pointed out two modes or methods by which appellants might have made the evidence a part of the record in this court, but with neither of

Davis *et al.* v. The Union Trust Company, Administrator.

these have they complied, and now virtually seek to be relieved of a duty or requirement imposed by law through and by virtue of an agreement to that effect upon the part of the appellee. It is manifest that appellee, under the circumstances, was not invested with any power, either by agreement or waiver, to relieve appellants of what the law exacted, nor to give this court jurisdiction to hear and determine the questions sought to be presented by this appeal. If it could relieve appellants of that which the law required to be done, in order to make the evidence a part of the record, why not further extend such relief, and thereby exempt them from procuring any part of the proceedings of the lower court to be transcribed and certified to this court, as the law exacts? A bill of exceptions containing the evidence in a case, when filed with the clerk of the lower court, unquestionably is a part of the record of that court. If a certified transcript thereof, under the circumstances in this case, can be dispensed with by the agreement or stipulation of the parties herein, certainly then the entire record below may be made up and brought to this court when incorporated into and made a part of the written agreement of the parties. That this is not authorized by the law no one will controvert. We have no power under the law to accept the agreement in question, and consider it as serving the purpose for which it is intended. This is so evident that it is not essential that we further consider the question. The evidence is not in the record, and it therefore follows that no error is shown, and the judgment is accordingly affirmed.

RICHARDSON ET AL. v. HEDGES ET AL.

[No. 18,828. Filed March 15, 1898.]

MORTGAGES.—School Fund.—Sufficiency of Notice of Sale by Auditor.

—A notice, under section 5820, Burns' R. S. 1894, of the sale of land mortgaged to secure a loan from the common school fund, describing the indebtedness as due the "common and congressional school funds," is sufficient, although the "common school fund" and the "congressional" are two separate and distinct funds. *pp. 54, 55.*

SAME.—School Fund Mortgage.—Notice of Sale.—A notice of the sale of land to satisfy a school fund mortgage, which notice properly describes the land by metes and bounds, is sufficient, though it erroneously states that the land was conveyed by a certain deed. *p. 56.*

SAME.—School Fund Mortgage.—Notice of Sale.—Where a county auditor, upon the sale of real estate to satisfy a number of school fund mortgages, exposes for sale the separate tracts of real estate so mortgaged, it is sufficient notice, under section 5820, Burns' R. S. 1894, to include all the tracts of land in one notice. *pp. 57, 58.*

SAME.—School Fund Mortgage.—Description of Real Estate.—Judicial Notice.—The real estate exposed for sale by a county auditor, to satisfy a school fund mortgage, is presumed to be in this State, and where such real estate is described by metes and bounds, and the section, township, and range are given, the court knows judicially in which county it is situated. *pp. 58, 59.*

From the Marion Circuit Court. *Affirmed.*

W. N. Harding, A. R. Hovey and T. S. Rollins,
for appellants.

R. O. Hawkins and H. E. Smith, for appellees.

MONKS, J.—Appellants, the only heirs at law of Lucy Richardson, deceased, brought this action to set aside a sale of real estate made by the auditor of Marion county to satisfy a mortgage executed to the State to secure a loan from the common school fund. The court made a special finding of the facts, and stated conclusions of law thereon in favor of appellees, to each of which appellants excepted. Final judgment was rendered against appellants. The er-

Richardson et al. v. Hedges et al.

rors assigned call in question each of the conclusions of law.

The validity of the sale is attacked upon the sole ground that the notice was insufficient. That part of the special finding necessary to the determination of the question presented is substantially as follows: That the notice and advertisement of said sale was published with headlines in large capital letters at the head thereof, as follows: "Notice of sale of lands and lots mortgaged to the State of Indiana for the benefit of the common and congressional school fund, held in trust by Marion county, Indiana." Below the headlines, in ordinary sized type, was the following: "In default of payment of principal and interest due to the common and congressional school funds held in trust by Marion county, Indiana, on the loans of said funds hereinafter mentioned, I will, in pursuance of the requirements of the school law, offer at public sale," etc.

It appears from the special finding that the description of the real estate in controversy was by metes and bounds, giving section, township, and range, and was the same in the notice as in the school fund mortgage, and that immediately following said description in the notice and mortgage was the following: "Being the same premises deeded by Lucy Jameson *et al.* to Lucy Richardson July 8, 1886, and recorded in Deed Record of Land 18, August 4, 1866." It also appears from said special finding that said real estate, with other real estate, was owned by one Alexander Jameson at the time of his death, and that his heirs made partition thereof by deed, and that the Lydia Jameson and other heirs named conveyed by partition deed to Lucy Richardson, as her portion as heir, the real estate in controversy. That afterwards, on July 12, 1886, Lucy Richardson and her

Richardson et al. v. Hedges et al.

husband conveyed the real estate in controversy to Alexander Jameson, her brother, who, on the same day, executed a mortgage to the State of Indiana for the use of the common school fund to secure a loan out of said fund of \$550.00, being the same mortgage upon which the sale sought to be set aside in this action was made. That immediately after the execution of said mortgage, said Alexander Jameson reconveyed said real estate to Lucy Richardson, who, in consideration thereof, assumed and agreed to pay said loan secured by said mortgage. Lucy Richardson died intestate in 1888, leaving appellants her heirs at law, who as such inherited said real estate.

The first objection urged to the notice is that there is no "common and congressional school fund;" that there are two funds, a common school fund, and also a "congressional township school fund," each of which is separate and distinct from the other, and that therefore the notice was untrue and misleading. It is true there are the two funds mentioned, and that they are separate from each other. Section 5750, Burns' R. S. 1894 (4325, R. S. 1881). The headlines were merely to call attention to the notice, where it is stated, "In default of payment of the principal and interest due the common and congressional school funds held in trust by Marion county, Indiana, on the loans of said funds hereinafter mentioned, I will, in pursuance of the requirements of the school laws," etc. The notice clearly names two funds, and two funds are provided for by the statute. Both funds are loaned and collected by the sale of the mortgaged real estate, or otherwise, under the same statute. These funds being named by the statute, and the notice specifying that the sale was made under the provisions of the school laws, everyone was required to take notice of the character of said funds and the provisions of the

Richardson et al. v. Hedges et al.

statute concerning the same. It must be presumed, therefore, that everyone knew that the funds designated in the notice as the "Congressional School Fund" was the fund denominated in the statute as the "Congressional Township School Fund." Moreover, the loan for the payment of which the real estate in controversy was sold, was from the common school fund, of which it cannot be claimed there was any misdescription in the notice.

It is next insisted by appellants that the notice is objectionable because "Mrs. Richardson, through whom appellants obtained title, got her title through Lydia Jameson, *et al.*, by a partition deed, July 8, 1886, while the notice identifies the real estate as, being the same premises deeded by Lucy Jameson, *et al.*, to Lucy Richardson, July 8, 1886, and recorded in Deed Record 18, August 4, 1866."

The real estate in controversy was properly described by metes and bounds in the notice, and in the mortgage. In each, the source of Lucy Richardson's title thereto, as being from Lucy Jameson, *et al.*, was stated in the same words. The description in the complaint is the same as in the notice and mortgage, except the source of Mrs. Richardson's title is not set forth. The designation of Lydia Jameson as Lucy Jameson in the mortgage and notice is not a misdescription of the real estate, and could not have misled anyone. The real estate was correctly described, and an examination of the records would have disclosed the fact that Mrs. Richardson, from whom appellants inherited said real estate, derived her title originally from her father, Alexander Jameson, and that the same was set off to her by partition deed, executed by Lydia Jameson, *et al.*, July 8, 1886, and that she and her husband conveyed said real estate to her brother, who executed the mortgage to secure

Richardson et al. v. Hedges et al.

the loan from the common school funds, and then reconveyed the real estate to her. The mortgage and notice each state that said deed was recorded August 8, 1866. This was a mistake, as the same was executed July 8, 1886, and could not have been recorded in 1866. The partition deed was no doubt recorded August 8, 1886, instead of 1866. This did not, however, render the description of the real estate uncertain. All that was stated in the mortgage and the notice in regard to the source of title, and the date of the recording of the partition deed to Mrs. Richardson, was surplusage, and was not essential to the description of the real estate.

In *Key v. Ostrander*, 29 Ind. 1, a description of real estate sold by the county auditor on a school fund mortgage, much less certain and definite than this description, was held sufficient. The court, on p. 6. said: "Is the deed void for uncertainty in the description of the land conveyed? We think not. 'The general rule in regard to the construction of the description of the premises in a deed is one of the utmost liberality. The intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated.' *Peck v. Mallams*, 10 N. Y. 509." See, also, *Frick v. Godare*, 144 Ind. 170, and cases cited.

It is also insisted by appellants that every person whose real estate is sold or offered for sale by the county auditor by virtue of the power of sale in a school fund mortgage "is entitled to have the same described in a separate and distinct notice, unincumbered with the descriptions of other property above and below it, and the county in which it is located should immediately follow the description of the land, and not at some where else in the notice." And that for this reason the notice was insufficient, and the sale illegal.

Richardson et al. v. Hedges et al.

The section of the statute providing for notice of such sales is as follows: "Before sale of mortgaged premises, the auditor shall advertise the same in some newspaper printed in the county where the land lies, if any there be (otherwise in a paper in the state, nearest thereto), for three weeks successively, and also by notice set up at the court-house door and in three public places in the township where the land lies." Section 5820, Burns' R. S. 1894 (4391, R. S. 1881). The auditor is required to advertise the sale for three weeks successively, etc., but he is not required to use any particular form of words in so doing. There is nothing in the statute requiring that a separate notice be given for the sale under each mortgage. The law provides that "on failure to pay any installment of interest when the same becomes due, the principal sum shall forthwith become due and payable." And the auditor shall, "on the fourth Monday in March, annually, offer for sale all mortgaged lands on which payments of interest are due on the first day of January and unpaid on day of sale." Section 5811, Burns' R. S. 1894 (4383, R. S. 1881). See, also, section 5812, Burns' R. S. 1894 (1256, Elliott's Supp.)

The sale in this case was made on the fourth Monday in March, 1892, the day fixed by statute for such sales, and it was proper for the auditor to include all the tracts of real estate in one notice which it was his duty under the law to sell for the payment of loans. It is a matter of common knowledge that such has been the practice of the State and other officers in making sales of real estate mortgaged to the State to secure sinking fund, school fund, college fund, and other loans of trust funds, at least since the revised statutes of 1852 took effect. This kind of notice was given in *Shannon v. Hay*, 106 Ind. 589, 590.

The statement in the notice, after the description of

Newman et al. v. Gates.

the different tracts to be offered for sale, that the same were situated in Marion county, Indiana, located said tracts of land in said Marion county, Indiana, as certainly and clearly as if the same words had followed immediately after each description. Moreover, the real estate in controversy is presumed to be in this State, and as the same was described by metes and bounds, and the section, township, and range where located, were named, we know judicially that said real estate is situate in Marion county, even if the county were not mentioned. *Brown v. Ogg*, 85 Ind. 234.

It is found that appellants were non-residents of this State, and had no actual knowledge of said sale. They were, however, bound to know when the installments of interest became due, and that if the same became due before January 1, 1892, and was not paid before the fourth Monday in March, 1892, that said real estate would be sold on that day by the county auditor. It follows that each of the conclusions of law was correct. Judgment affirmed.

NEWMAN ET AL. v. GATES.

[No. 18,449. Filed March 15, 1898.]

APPELLATE COURT.—*A Court of Last Resort.—Decisions Not Subject to Review.*—The Appellate Court, in all cases in which it is given jurisdiction, is a court of last resort, and its decisions are not subject to review, whether by appeal or by writ of *certiorari*.

Original action. *Petition for writ of certiorari dismissed.*

F. Winter and Charles Martindale, for petitioners.

Albert Bakker, Edward Daniels, John B. Cockrum, E. E. Gates and G. E. Hume, for respondent.

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168	173

Newman et al. v. Gates.

HOWARD, C. J.—This is a petition for a writ of *certiorari* to the Appellate Court, to require that court, through its clerk, who is also the clerk of this court, to certify up the transcript and papers in the case of *Gates v. Newman*, 18 Ind. App. 392, in order that it may be determined whether, as alleged, the Appellate Court in that case exceeded its jurisdiction by deciding contrary to the law as decided by the Supreme Court.

The petitioners represent that in said cause of *Gates v. Newman*, being an appeal from the superior court of Marion county, the Appellate Court has not been governed in all things by the law as declared by the Supreme Court, but has attempted to reverse or modify a decision of this court made in *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308.

The law said to limit the jurisdiction of the Appellate Court, in the respect here in question, is found in section 25 of the act creating that court, as amended February 16, 1893 (Acts 1893, p. 31, section 1362, Burns' R. S. 1894, 6586, Horner's R. S. 1897), and is as follows: "The Appellate Court shall be governed in all things by the law as declared by the Supreme Court of this State, and it shall not, directly or by implication, reverse or modify any decision of the Supreme Court of this State." Provision is also made, in the same section, for the transfer of any cause to the Supreme Court where the Appellate Court is of opinion that a decision of this court controlling the decision to be made in the cause transferred ought to be overruled.

There can be no doubt that the legislature, in creating the Appellate Court, and particularly in the enactment of the section above cited, expressed its intention that the interpretation of the law in the courts of this State should remain uniform and consistent,

Newman et al. v. Gates.

and that such interpretation should be determined wholly by the decisions of the Supreme Court.

The same conclusion would follow from the words of the constitution providing for the organization and establishment of a supreme judicial tribunal; and also from the fact that "in the very necessity created by a system of government of delegated and distributed powers there must be lodged somewhere supreme and paramount judicial power." Elliott App. Proc., section 25.

The fact that there is an obligation thus imposed upon the Appellate Court, requiring that it "shall be governed in all things by the law as declared by the Supreme Court of this State," cannot therefore be a matter of uncertainty. That such obligation was made a fundamental principle of its very creation and existence has never been questioned by that tribunal, or by any one of the body of upright and learned judges who have graced its bench, and there added lustre and dignity to the jurisprudence of the State.

Indeed, in the very case of *Gates v. Newman*, as shown in the opinion there handed down, the Appellate Court did not profess or attempt to decide anything in opposition to any ruling of this court, whether in *Goble v. Dillon*, *supra*, or elsewhere. On the contrary, *Goble v. Dillon* was relied upon as authority for the decision made in *Gates v. Newman*.^{*} But the court distinguished the latter case from the former, and correctly so, we believe, as will appear from a careful reading of the opinions in the two cases. Consequently, even if it were proper for us to entertain the petition for a writ of *certiorari*, we should nevertheless have to deny the writ for the reason that there is no conflict in the cases referred to.

We are of opinion, however, that no authority is

Newman *et al.* v. Gates.

shown in the petition before us for a writ of *certiorari* from this court to the Appellate Court. The act creating that court provides expressly for a court of final resort, although with certain defined and limited jurisdiction. In all cases in which the Appellate Court is given jurisdiction its decisions are made final, and not subject to review, whether by appeal or by writ of *certiorari*. The evident purpose of the legislature was not to provide for an intermediate court, but for one of last resort.

In the creation of the United States Circuit Court of Appeals, Congress made express provision for transferring causes from that court to the Supreme Court of the United States, in all cases, either by appeal or by *certiorari*. *Forsyth v. Hammond*, 166 U. S. 506. But, in the act creating our Appellate Court, no such limitation is found; nor is there anything in the constitution or laws from which it might be implied.

No doubt, if the Appellate Court should undertake to decide a cause of which it were not given jurisdiction by the act of its creation, such decision would be of no effect; and in that case the Supreme Court, by virtue of its power to protect its own jurisdiction, might cause the appeal to be brought here for decision. *Ex parte Kiley*, 135 Ind. 225; *In re Pittsburgh, etc., R. W. Co.*, 147 Ind. 697. Jurisdiction of all appeals is primarily in the Supreme Court; and the Appellate Court has only such jurisdiction as has been expressly given to it by the legislature. *Ex parte, Sweeney*, 126 Ind. 583.

But if the Appellate Court actually has jurisdiction of an appeal, as is admitted was the case here, that court must, by force of the statute of its creation, have full power to render final judgment on such appeal; and this, too, irrespective of the kind of decision that may be made. Having the power to decide, the court may decide wrong as well as right.

Bookout v. Bookout.

The case is not essentially different from other cases in which the right of appeal is not given. From the judgment of a circuit court, for example, in a cause originating before a justice of the peace, and where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars, there can be no appeal. Section 644, Burns' R. S. 1894 (632, R. S. 1881). So a justice of the peace has original exclusive jurisdiction in misdemeanors where the fine assessed cannot exceed three dollars. Section 1706, Burns' R. S. 1894 (1637, R. S. 1881). In like manner, the decision of a question by a board of county commissioners, a common council, or other tribunal or officer, may be made final. *Board, etc., v. Davis*, 136 Ind. 503; *Hughes v. Parker*, 148 Ind. 692.

In all those cases, as well as in the case before us, it is presumed that judges and other officials will do their sworn duty. The law therefore reposes implicit confidence in the integrity and wisdom of those tribunals of last resort from whose decisions no appeal is provided for, save only the ultimate appeal to the forum of conscience and to the judgment of the people, from whom all authority, legislative, executive, and judicial, is derived. Petition dismissed.

BOOKOUT v. BOOKOUT.

[No. 18,355. Filed March 17, 1898.]

150	63
152	67

HUSBAND AND WIFE.—*Marriage a Valuable Consideration.*—Marriage is held to be a valuable consideration, and the wife is regarded as a purchaser of all property which accrues to her by virtue of her marital rights, or by virtue of any antenuptial contract. p. 66.

SAME.—*Conveyance of Real Estate in Fraud of Marital Rights.*—A secret voluntary conveyance by a man of his lands on the eve of his marriage operates as a fraud upon his wife, and cannot serve to defeat her upon his death of her interest in such lands allowed to her under the law as his widow. p. 66.

From the Henry Circuit Court. *Affirmed.*

Bookout v. Bookout.

J. M. Brown and S. H. Brown, for appellant.

M. E. Forkner, for appellee.

JORDAN, J.—This was a suit in the lower court by appellee to set aside certain conveyances of real estate made by her late husband, Robert Bookout, to appellant and others prior to their marriage, on the grounds that said conveyances were executed for the fraudulent purpose of defeating her inchoate interest in the lands conveyed. She was successful in her action in respect to twenty-five acres of the land conveyed to appellant, in which the court found she was entitled to her interest as widow of her deceased husband, and she was awarded partition for the same. But two questions are sought to be presented by appellant: First, the sufficiency of the complaint on demurrer; second, the sufficiency of the evidence to sustain the judgment.

The complaint avers, in substance, that the plaintiff, Mrs. Bookout, is the lawful widow of Robert Bookout, deceased, and that he and the plaintiff were married to each other, and became husband and wife in August, 1891, and that she remained his said wife until the date of his death, which occurred in October, 1895. That at the time of said marriage her husband, Robert Bookout, was in actual possession of the lands described in the complaint, and was occupying the same as his homestead. And it is averred that he was in fact the owner of said real estate and in visible and open possession thereof at the time of their marriage under a clear and indefeasible title of record; that to induce the plaintiff to marry him he represented to her that he was the owner of all the lands in question, and promised in consideration that she would marry him, that if she survived him as his widow, she would have and receive her rights as such in and to said lands. It is alleged that the public

Bookout v. Bookout.

records disclosed that the said Robert Bookout was the absolute owner of said realty, and that the plaintiff relied on said representations and the showing of title as exhibited by said records, and in good faith, and without any notice of the fraudulent conveyances mentioned in the complaint, consented to and did marry the said Robert Bookout, as above stated; that she was induced to marry him by reason of said representations of ownership of said lands, and without the same having been made she would not have entered into said marriage relation. The complaint further alleges that a short time prior to the said marriage, and in anticipation thereof, and for the purpose of cheating and defrauding her in her marital rights, said Robert Bookout executed two deeds purporting to convey the lands in controversy to the defendants, who are his children and grandchildren by a former marriage, the plaintiff being a childless second wife. It is further averred that these deeds were executed wholly without any consideration, and for the fraudulent purpose, as heretofore stated, all of which the defendants had full knowledge at the time of the execution thereof; that in furtherance of said fraudulent purpose, and in order to conceal the fact of their execution from the plaintiff, the defendants withheld said deeds from the public records for more than forty-five days from the time of their execution, and, in fact, until within a few months of the death of the said Robert Bookout; that the latter at his death possessed no other lands than these in dispute, and owned at said time only a small amount of personal property, not exceeding \$500.00 in value. The prayer is that the conveyances mentioned be set aside as fraudulent and void as to plaintiff, and that she be adjudged the owner, during her life, of the undivided

Bookout v. Bookout.

one-third of said real estate, and that she have partition of her said interest, and that the remainder of the realty be declared subject to a lien for the \$500.00 allowed her under the law.

Marriage, in the eye of the law, is held to be a valuable consideration, and the wife is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of her marital rights, or by virtue of any valid antenuptial contract. *Derry v. Derry*, 74 Ind. 560. Not only is marriage a valuable consideration, but it is the highest consideration recognized by law. *Richardson v. Schultz*, 98 Ind. 429, 435. Persons about to marry occupy a position of confidential relations to each other requiring the greatest good faith. 14 Am. and Eng. Ency. of Law, 546. Consequently the doctrine affirmed and supported by the authorities is that a secret voluntary conveyance by a man of his lands on the eve of his marriage operates as a fraud upon his wife, and can not serve to defeat her upon his death of her dower or interest in such lands allowed to her under the law as his widow. Therefore, she may successfully assert her rights thereto as though such conveyance had not been made. The facts set up in the complaint bring the case fully within the rule affirmed by the decisions of this court, which, in effect, are that, where a man and a woman are about to enter into marriage relations with each other, and one represents to the other that he or she, as the case may be, is the owner of certain property, as an inducement to such marriage, and such representations enter into and operate as a part of the consideration or inducement to the consummation of the marriage, then, a secret voluntary conveyance of the property made on the eve of the marriage, would be fraudulent, and could not defeat the rights under the law of the surviving husband or

Kinsley, Guardian v. Kinsley.

widow, as the case might be. *Dearmond v. Dearmond*, 10 Ind. 191; *Alkire v. Alkire*, 134 Ind. 350.

Appellant insists that the second paragraph of the complaint is bad for the reason that it does not aver that the husband owned the lands at the time of the marriage, or that he died seized thereof, as owner. In this contention, however, counsel for appellant are mistaken. The second paragraph of the complaint, while somewhat more specific in its averments, is substantially the same as the first, from which we have summarized the material facts heretofore mentioned and set out, and it expressly alleges that the husband was in fact seized of the lands in controversy at the time of his marriage, and also at the date of his death. Or, in other words, the paragraph proceeds upon the theory that the husband in fact was seized of the lands in dispute at the date of his marriage, and also at his death, for the use of the plaintiff, or, at least, so far as her interest therein was concerned, notwithstanding the fraudulent conveyances. The complaint is sufficient, and the court did not err in overruling the demurrer thereto. Without passing upon the question of whether the motion for a new trial was seasonably filed, we have considered the evidence in the case, and are of the opinion that it is sufficient to sustain the judgment. The judgment is therefore affirmed.

KINSLEY, GUARDIAN, v. KINSLEY.

[No. 18,447. Filed March 17, 1898.]

PLEADING.—Demurrer.—A demurrer to a complaint for want of facts raises the question of the right of the plaintiff to maintain the action. *p. 69.*

GUARDIAN.—May Maintain Suit to Enjoin Injury to Ward's Estate.—A guardian, in possession of ward's real estate, may maintain a suit in his own name to enjoin injury to his ward's real estate. *pp. 69-74.*

150	67
e108	653

Kinsley, Guardian v. Kinsley.

From the Shelby Circuit Court. *Reversed.*

T. B. Adams and Isaac Carter, for appellant.

K. M. Hord, E. K. Adams and Shaw & Horst, for appellee.

HOWARD, C. J.—The appellant filed her complaint against the appellee in two paragraphs, to each of which the court sustained a demurrer. In the first paragraph of the complaint it is alleged: That the appellant is the duly appointed guardian of one Goldie Kinsley; that since her said appointment, at the June term, 1896, of the Shelby Circuit Court, she has been, as such guardian, in possession of certain described real estate in Shelby county; that the appellee, “without right, unlawfully, and without legal authority,” and, though forbidden by this guardian so to do, has entered upon said real estate, and is engaged in raising and removing a dwelling house from the same; that said house is permanently attached to and a part of said real estate, and cannot be removed therefrom without great damage thereto and to her ward’s use and enjoyment and the rents and profits thereof; and that the damages to said premises will be irreparable. The prayer is for a temporary restraining order, and on the final hearing for a permanent injunction and damages. The second paragraph is similar, except that it alleges: That the appellee has entered upon the premises and raised the building from its foundations and placed the same upon rollers for the purpose of removing it from the premises; that great damage has already been caused by the pulling away of the foundations, and the wrenching and twisting of the frame work, windows, and doors, and the cracking of the plastering. The prayer in this paragraph is for damages.

The reason for the action of the court in sustaining

Kinsley, Guardian v. Kinsley.

the demurrer to the complaint does not appear from the record; but we learn from the briefs of counsel that the ruling of the court was based upon the holding that the guardian was not the proper party to institute the action. It has been decided that a demurrer to a complaint for want of facts does raise the question of the right of the plaintiff to maintain the action. *Wilson v. Galey*, 103 Ind. 257; *Farris v. Jones*, 112 Ind. 498.

There is a second ground of demurrer stated, that there is a misjoinder of causes of action. This error, however, even if it existed, would not, by force of the statute, authorize a reversal of the judgment. Section 344, Burns' R. S. 1894 (341, R. S. 1881); *Cargar v. Fee*, 140 Ind. 572.

It is said in appellant's brief that the learned judge who presided in the court below, in passing upon the demurrer, said that, at first, he thought that the guardian could maintain a suit in her own name to prevent waste to her ward's real estate, but was of opinion that in the case of *Wilson v. Galey*, *supra*, it was decided otherwise; and that, while he regarded that case as bad law, he felt nevertheless that he was bound by it, and would have to sustain the demurrer, on the ground that the guardian could not bring such a suit in her own name, but that it must be brought in the name of the ward by a next friend. Whether *Wilson v. Galey*, *supra*, is good law we need perhaps not say, but, even if it is, we do not think it is authority in the case at bar. It was there alleged in the guardian's complaint for waste, "that his wards were the owners of certain real estate, particularly described, wherein the appellant Sophia B. Wilson had a life estate for and during her own life, and then had possession thereof as such life tenant." In the case at bar it is shown in the complaint that the guardian

Kinsley, Guardian v. Kinsley.

is herself, as such guardian, and has been ever since her appointment, in possession of the real estate in controversy. In the former case, the party committing the waste was herself in possession of the real estate, but here the guardian is in possession, and is seeking the aid of the court to protect that possession. It has frequently been decided that the disturbance of the rightful possession of real estate may be prohibited by injunction. *Central Union Tel. Co. v. State, ex rel.*, 110 Ind. 203; *Kern v. Isgrigg*, 132 Ind. 4.

It is true that, in section 256, Burns' R. S. 1894 (255, R. S. 1881), it is provided that "when an infant shall have a right of action, such infant shall be entitled to bring suit thereon;" and that, in section 257, Burns' R. S. 1894 (256, R. S. 1881), it is further provided that, "before any process shall be issued in the name of an infant who is a sole plaintiff, a competent and responsible person shall consent in writing to appear as the next friend of such infant." These are no doubt wise statutes for the protection of the rights of infants, but we do not think they were intended to prohibit other forms of action in favor of infants and their estates. It has been expressly held that, under section 261, Burns' R. S. 1894 (260, R. S. 1881), an infant may sue as a poor person without a next friend. *Britton v. State, ex rel.*, 115 Ind. 55. And, under section 1208, Burns' R. S. 1894 (1194, R. S. 1881), providing that in all proceedings for partition of land "guardians may act for their wards as their wards might have acted, being of age," it has been held that guardians of minors may bring or defend actions in their own names for partition of the lands of their wards. *Bowen v. Swander*, 121 Ind. 164. Also, under clause 5 of section 2685, Burns' R. S. 1894 (2521, R. S. 1881), providing, among other things, that it shall be the duty of a guardian of a minor to "collect all

Kinsley, Guardian v. Kinsley.

debts due such ward," it has been held that a guardian may bring suit in his own name to collect such debts. *Shepherd v. Evans*, 9 Ind. 260. It has also been held that the guardian of a minor may sue and recover for injury to his ward, precisely as the minor might have sued and recovered by next friend in case he were not under guardianship. *Louisville, etc., R. W. Co. v. Goodykoontz*, 119 Ind. 111; *Cleveland, etc., R. W. Co. v. Moneyhun*, 146 Ind. 147.

These instances make it plain that it was not intended that the right to sue by next friend should be the only right of action in favor of an infant. It is indeed well that an infant should have the right to sue by next friend. There may be no guardian, or the guardian may be unfaithful to his trust. To put a minor, so far as possible, on an equality with an adult in this respect, it was necessary to provide that, as he is incompetent in law to speak for himself, some friend might come into court with him, and there speak and act for him. As the minor could not be bound for costs, it was further necessary to provide that the friend appearing for him should be liable for the costs of the suit brought. None of these reasons appear in case the guardian comes into court for his ward. We are therefore of opinion that the statutes providing that an infant may bring suit by next friend were intended as an additional protection to infants and their estates, and were not meant to deprive them of other means of obtaining such protection.

Moreover, it is clear, as we think, that the statutes in relation to guardians fully authorize the bringing of such an action as that here brought. By section 2673, Burns' R. S. 1894 (2512, R. S. 1881), it is provided that the appointment of a guardian for a minor in any county shall "extend to all the property of the

Kinsley, Guardian v. Kinsley.

ward within this state." By "all property" is meant, of course, not only personal property but also real estate. By section 2676, Burns' R. S. 1894 (2515, R. S. 1881), it is provided that "before any person shall be appointed guardian of any minor, he shall file in the office of the clerk of the court having such appointment to make, a statement, in writing, of the whole estate of said minor, and the probable value thereof, specifying the value of the personal property and real estate separately, and also specifying the probable value, if any, of the annual rents and profits of such real estate; and shall verify the same by affidavit; and shall give bond, with two or more resident freehold sureties, who shall be bound jointly and severally in said bond, payable to the State of Indiana in penalty double the amount of such personal property and four times the annual value of such rents and profits." Why the law should require the guardian to file a valuation of the real estate of his ward and of the annual rents and profits of such real estate, and why he should be required to give bond, not only for double the value of the personal property, but also for four times the annual value of the rents and profits,—and yet not be authorized to protect, by suit or otherwise, his possession and custody of such real estate and the rents and profits of the same, is not at all easy to understand. Shall he give bond to account to the court for the rent of his ward's house and land, in penalty four times such rent; and yet the court refuse him the right to prevent an intruder from coming upon the land and taking away the house, and also refuse him the right to recover damages for injury done the house and land? Or is the guardian driven to the alternative of going out among friends of his ward to seek the aid of some such friend who may be able to give a cost bond and so bring

Kinsley, Guardian, v. Kinsley.

suit against the despoiler of the infant's estate? Yet it is provided in section 2682, Burns' R. S. 1894 (2518, R. S. 1881), that the guardian shall have "the management of such minor's estate during minority;" and by section 2685, Burns' R. S. 1894 (2521, R. S. 1881), it is further made his duty "to manage the estate for the best interests of his ward." How he is to manage the estate without the power to bring an action necessary for its protection is not apparent. Having the right to manage his ward's estate, and it being made his duty to manage it for the best interests of his ward, it would be quite unreasonable to say that the law did not also give to the guardian the means to enforce such right and to perform such duty.

In the control given to guardians over the property of their wards, the law does not seem to distinguish between personal and real property, except that the guardian may not sell or incumber real estate without an order of court. But, for the reason simply that the statute gives to the guardian the custody and management of the personal property of his ward, it has been held that he may maintain replevin for it, notwithstanding the infant might also, by next friend, in a proper case, bring suit to recover such property. *Boruff v. Stipp*, 126 Ind. 32. In the case cited, the court held that the right of action for possession is not necessarily in the infant, when he has a legally appointed guardian claiming the possession and custody of the property. The guardian, said the court, "having the right to the control and management of the property he must, as a necessary incident, have the right to recover possession of such property from one unlawfully retaining the possession of the same. It certainly does not lie in the mouth of one who unlawfully retains possession of the property of the ward, and deprives the guardian from managing and

Campbell v. The State.

controlling the same to say that he has no right to sue for and recover the possession when the infant is making no objection."

The right and duty of the guardian to protect his ward's real property can certainly be no less than his right and duty to protect such ward's personal property. The judgment is reversed, with instructions to overrule the demurrer to each paragraph of the complaint.

CAMPBELL v. THE STATE.

[No. 18,406. Filed March 18, 1898.]

150	74
157	530
150	74
1171	82

LARCENY.—Possession of Stolen Property.—Presumption.—Instruction.—On a prosecution for larceny the court instructed the jury that the exclusive possession, by defendant, of the stolen property, soon after the larceny, if not satisfactorily explained, raises a "presumption of law" that defendant is guilty. *Held*, that the instruction was technically incorrect, in that the presumption raised was a presumption of fact, and not of law, but that the error was harmless, where other instructions given showed that the court meant a disputable, and not a conclusive, presumption. *pp. 75-82.*

SAME.—Possession of Stolen Property.—Presumption.—When Duty of Jury to Convict.—Where, on a prosecution for larceny, the evidence established beyond a reasonable doubt that the stolen goods were found in the exclusive possession of the defendant who failed to account for such possession so as to show that it was an honest one, or gave a false account thereof, and there was no other evidence or proof of countervailing circumstances, the jury were legally bound to find defendant guilty, although the presumption upon which the jury found such guilt was technically a presumption of fact and not one of law. *p. 84.*

CRIMINAL LAW.—Appeal.—Reversal of Judgment.—Judgments in criminal cases ought not to be reversed for errors which do not materially injure the accused. *p. 85.*

From the Noble Circuit Court. *Affirmed.*

H. C. Peterson and E. G. Cook, for appellant.

W. A. Ketcham, Attorney-General, *Alfred E. Dickey* and *William M. Aydelotte*, *Merrill Moores* and *S. E. Alvord*, for State.

Campbell v. The State.

MCCABE, J.—The appellant was jointly indicted with another, his wife, charging them with burglary and larceny. The appellant was tried separately by a jury, was found guilty of petit larceny and judgment followed upon the verdict, the court having overruled appellant's motion for a new trial. The only ruling insisted on as error, under that motion, is the giving of the following instruction by the court: "If you find from the evidence, beyond a reasonable doubt that the goods described in the indictment, or any portion of them, were stolen, and that such stolen property was found in the exclusive possession of the defendant, within a short time after the larceny was perpetrated, such possession imposes on the defendant the duty and burden of explaining his possession of the said goods; and, if he has failed to satisfactorily account as to how he came by the stolen property, or has given a false account of how he came into possession of such stolen property, the law presumes that the defendant stole the property, and this presumption may be strong enough to justify you in finding him guilty."

The objection urged to this instruction is that the presumption arising from the facts recited therein is one of fact, and not one of law, as the appellant insists the instruction plainly implies. In support of the objection to this instruction counsel cite us to *Blaker v. State*, 130 Ind., at pp. 205-207, where this court condemned an instruction as erroneous because it told the jury that the presumption of guilt arising from a similar state of facts was conclusive, the court there saying that "this is plainly erroneous." This court also said in that case that: "The exclusive possession of stolen property soon after the larceny, if unexplained, raises a presumption that the person in whose possession it is found is guilty of the larceny. Gillett

Campbell v. The State.

Crim. Law, section 553; *Smathers v. State*, 46 Ind. 447; *Galvin v. State*, 93 Ind. 550; *Turbeville v. State*, 42 Ind. 490; *Hall v. State*, 8 Ind. 489; *Engleman v. State*, 2 Ind. 91; *Jones v. State*, 49 Ind. 549."

This decision only lacks one element of upholding the instruction now before us, and that is, it told the jury that the facts enumerated raises a presumption of guilt without saying whether the presumption so raised was one of law or fact, while the one now before us tells the jury that it was one of law.

One of the cases cited in the quotation above, namely, *Smathers v. State*, 46 Ind., at p. 450, states the law thus: "The court should have charged the jury that if it found from the evidence that the goods described in the indictment, or some portion of them, had been stolen, and that such stolen property had been found in the exclusive possession of the defendant within a short time after the larceny was perpetrated, such possession imposed upon the defendant the duty and burden of explaining his possession; and if he has failed to satisfactorily account as to how he came by the stolen property, or has given a false account of how he came into possession of such stolen property, the law presumes that the defendant stole such property, and this presumption was strong enough to justify them in finding the defendant guilty." But it is contended that it has since been held by this court that such presumption is one of fact and not one of law, and that such holding is to be found in *Smith v. State*, 58 Ind. 340; *Blaker v. State*, *supra*; and *Dean v. State*, 130 Ind. 241.

It matters little that the last case does not sustain appellant's contention, as the other two cases do, and that the weight of authority generally does sustain it. But there were other instructions upon the subject, which makes it necessary to examine the differ-

Campbell v. The State.

ence between presumptions or inferences of law and fact.

Appellant's counsel refer us to the following statement of the law on the subject from *Ayres v. State*, 21 Tex. App. 399: "Possession of property recently stolen is *prima facie* evidence of theft, and whilst the law would from such circumstances authorize an inference and presumption of guilt, such an inference and presumption is not a mere legal one but is one of fact to be found by the jury. And the court should, in no instance, charge the conclusiveness of such presumption or inference, but should submit them as facts to be found by the jury, for, at most, they are but circumstances only from which guilt is inferred, and not positive proof establishing it." This we think is a correct statement of the law. But there is nothing in the instruction before us to the effect that the presumption was conclusive unless it be in the words in the instruction, "the law presumes that the defendant stole such property." But there are two kinds of legal presumptions. If one of them was intended and meant by the language quoted from the instruction before us, then the instruction was not materially erroneous; and, if the other was intended, then perhaps it was.

Speaking of presumptions of law, Burrill on Circumstantial Evidence, at p. 46, *et seq.*, says: "Of these presumptions of law, some are, as already observed, mere natural presumptions or principles, recognized and enforced without change. Others are natural presumptions artificially strengthened. Others, again, are mere technical assumptions, or arbitrary rules. They have long been divided into two distinct classes: *conclusive*, or absolute, and *disputable* or rebuttable presumptions.

"*Conclusive* presumptions, as they are ably ex-

Campbell v. The State.

plained by an American writer on the subject, 'are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long experienced connection (between facts) has been found so general and uniform, as to render it inexpedient for the common good, that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden.' * * * Of this class is the presumption that a sane man contemplates and intends the natural and probable consequences of his own acts, which has already been shown to be a natural presumption or principle. Another is, that an infant under seven years of age is incapable of committing a felony, which also rests essentially upon the laws of nature; the precise limitation of time being dictated by obvious considerations of expediency, and indeed of necessity. 'In these cases of conclusive presumption,' it has been well remarked, 'the rule of law merely attaches itself to the circumstances, when proved; it is not deduced from them. It is not a rule of inference from testimony; but a rule of protection, as expedient, and for the general good.'

"*Disputable* or rebuttable presumptions, otherwise called inconclusive presumptions, and by the civilians *presumptiones juris tantum*, are, like the preceding class, intendments made by law, but, unlike them, only hold good until disproved. 'These, as well as the former,' observes an American writer, already quoted,

Campbell v. The State.

'are the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class, is not so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode, *the law* defines the nature and amount of the evidence which it deems sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favor of the presumption.'"

And the same author, on page 59, says: "It is not to be understood, however, that presumptions of *law* are excluded from the view of juries in criminal cases. Some leading presumptions of this class, and belonging to its rebuttable division, such as the presumption of malice in cases of homicide and of an intent to defraud in cases of forgery, constantly occur for consideration, and are of great importance as guides to correct conclusions. It is true, that these are essentially founded upon a natural presumption which has been already adverted to; but they are not processes, nor the results of processes of reasoning from proved facts in particular cases. The fundamental natural presumption itself has been shown to be strictly an abstract *rule* or maxim, and of the same character are the legal presumptions derived from it. Hence it belongs properly to the province of the *court* to direct the attention of the jury to such of them as become applicable in cases submitted to

Campbell v. The State.

them for trial. Of conclusive presumptions in criminal cases, there are but few; and the fewer, it is said, the better."

Then the author discusses at length and classifies the various kinds of presumptions of fact, and on page 66, continues thus: "A strong presumption of fact, is one which, in the language of *Huberus*, determines the tribunal in its belief of an alleged fact, without, however, excluding the belief of the possibility of its being otherwise. Its effect, therefore, is to shift the burden of proof to the opposite party, and if this proof be not made, the presumption is held for truth. The recent possession of stolen goods, by an accused person, raises a *strong* presumption that he is the thief; it puts him upon his defense, and calls upon him to show how he came by them; and, in the event of his failing to do so, satisfactorily, it justifies the final and absolute presumption of his guilt. Presumptions of this nature are entitled to great weight, and, where there is no other evidence, are generally decisive in civil cases. * * * A strong presumption of fact is scarcely distinguishable from a rebuttable presumption of law. Indeed, in some cases, the same presumption has been referred to both heads." See the authorities cited by the author in support of these several propositions. These principles account for the seeming conflict of our own cases upon this point.

Now if the court in giving the instruction before us had reference to a rebuttable or disputable presumption of law, then it had reference to that sort of a presumption of law that is scarcely distinguishable from a presumption of fact. And if the professional mind can scarcely make the distinction, certainly there is no room for the supposition that the nonprofessional mind of the jury ever saw the distinction, and hence no room for the supposition that the jury

Campbell v. The State.

were ever misled by the instruction. The other instructions given at defendant's request make it abundantly clear that the court meant by the instruction, not the conclusive or indisputable presumption of law, but the rebuttable or disputable presumption of law.

The following are some of the other instructions given at the request of defendant: "(5) You are further instructed that before you can find the defendant, Charles Campbell, guilty under the second count of the indictment, the State must establish by the evidence, beyond a reasonable doubt, that the defendant, at the county of Noble, in the State of Indiana, within two years prior to May 19, 1897, feloniously stole some of the goods mentioned in said count." "(7) If the jury believe from the evidence that the goods charged to have been stolen, or some of them, were found, shortly after the burglary, in the exclusive possession of the defendant, Charles Campbell, and he has failed to show how he came by them, he having it in his power to explain his possession, if it was an honest one, such possession is a circumstance from which the jury are authorized to raise a presumption in connection with the other circumstances in the case, to weigh against the defendant, but the defendant is only bound, in such case to raise a reasonable doubt whether he had so come by said property or not." "(9) If the evidence raises a reasonable doubt in your minds whether Loucella Campbell, the defendant's wife, stole said goods before she was married, and after said marriage brought said goods to her husband, and they were found in his house, then I charge you that he would not be called upon to account for his possession of them, and it will be your duty to acquit him under the charge of larceny." "(10) If the defendant has

Campbell v. The State.

shown to you that he has always heretofore been possessed of a good character for honesty, you may take that fact into consideration with all the other facts in the case in determining the probability of his having committed the offense charged." "(11) Before you can convict each juror must be satisfied of the defendant's guilt beyond a reasonable doubt."

It thus clearly appears, when construing these instructions along with the one complained of, that the court did not mean by that instruction that the presumption of law arising upon the facts therein recited belonged to the class of presumptions known as conclusive presumptions of law, but on the contrary made it plain that the court meant and intended it to be understood as belonging to the other class of legal presumptions known as rebuttable or disputable presumptions of law. While the instruction was technically incorrect in calling it a presumption of law instead of a presumption of fact, yet as there is no practical difference between a disputable presumption of law and a presumption of fact, and in view of the other instructions, it is made clear that it could not have misled the jury.

If the author from whom we have quoted is correct in saying that "a strong presumption of fact determines the tribunal in its belief of an alleged fact," and that "its effect therefore is to shift the burden of proof to the opposite party, and if this proof be not made, the presumption is held for truth;" and that "the recent possession of stolen goods, by an accused person raises a strong presumption that he is the thief," and that "it puts him upon his defense, and calls upon him to show how he came by them; and, in the event of his failing to do so satisfactorily, it justifies the final absolute presumption of his guilt," how can it logically or reasonably be contended that

Campbell v. The State.

the jury had any right, under such circumstances, to do otherwise than convict. There can be no doubt that the above statement of law is supported by the overwhelming weight of authority. But it is said that the presumption arising upon the facts recited in the instruction in question was one of fact to be found by the jury and not of law. So, too, the rebuttable presumption of law must also be found by the jury. And the question arises, was not the jury just as much bound to find the truth of the presumption in the absence of all countervailing evidence, even though the court had stated it to be one of fact, instead of stating incorrectly as it did, that it was one of law? Most certainly it was. When the evidence shows beyond a reasonable doubt that goods recently stolen are found in the exclusive possession of the accused, and there is no other evidence and no countervailing circumstances, then the jury are not only justified in finding the defendant guilty, but they are not justified in finding any other way. Where the evidence is legally sufficient to establish a fact, and there is no contradictory evidence or countervailing circumstances, the law absolutely requires the jury to find according to such evidence, and they have no right to arbitrarily disregard such evidence. *State, ex rel., v. Wilson*, 90 Ind. 114.

If the facts recited in the instruction in question were proved beyond a reasonable doubt, and there was no contradictory evidence or countervailing circumstances in evidence, which supposition, as all the instructions construed together clearly indicate, the court made a condition to the final presumption of law that appellant was guilty, and, if that supposed uncontradicted evidence had the legal quality to warrant a conviction, even though it was a presumption of fact, and not one of law, it was the bounden and unavoidable duty of the jury to find him guilty.

Campbell v. The State.

Did the facts recited in the instruction have that legal quality in the absence of all opposing evidence? The author from which we have quoted above answers that question at page 446 thus: "Hence it has become a rule of evidence, that the possession of property which has been recently stolen, raises such a presumption of guilt against the possessor, as to throw on him the burden of showing how he came by it, or that he came honestly by it; and, in the event of his failing to do so, to warrant the final inference or conclusive presumption of his being the real offender. The presumption arising from the possession of the property, in such cases, furnishes, indeed, the most common and simple instance of the application and effect of presumptive evidence, in the whole range of criminal law. The presumption itself is strictly a natural one, although, from its being fully recognized by the law, it has sometimes been regarded as a presumption of law."

If, therefore, the evidence established beyond a reasonable doubt that the recently stolen goods were found in the defendant's exclusive possession, and he failed to account for such possession so as to show that it was an honest one, or gave a false account thereof, and there was no other evidence or proof of countervailing circumstances, the jury were legally bound to find him guilty, although the presumption upon which they found such guilt was technically a presumption of fact and not one of law. And the instructions, including the one in question, did not go that far.

There being no practical difference between a rebuttable presumption of law, that being the kind of a presumption the court meant, and a presumption of fact, the instruction in question, when construed along with others, under the law, though technically

Halstead v. Jessup.

incorrect, yet, under the circumstances, it required of the jury no different finding than if the presumption mentioned had been stated to be a presumption of fact. Therefore, under the circumstances of this case, there was no material error in giving the instruction, though it was technically incorrect in the respect mentioned. Under such circumstances, the statute and decisions of this court forbid the reversal of a judgment for such error. Section 1964, Burns' R. S. 1894 (1891, R. S. 1881); *Short v. State*, 63 Ind. 376; *Norton v. State*, 106 Ind. 163; *Binns v. State*, 66 Ind. 428; *Powers v. State*, 87 Ind. 144; *Wood v. State*, 92 Ind. 269; *Clayton v. State*, 100 Ind. 201; *Epps v. State*, 102 Ind. 539; *Strong v. State*, 105 Ind. 1; *Galvin v. State*, 93 Ind. 550; *Henning v. State*, 106 Ind. 386, 55 Am. Rep. 756; *Murphy v. State*, 97 Ind. 579; *Choen v. State*, 85 Ind. 209, 211. And it has been held, very properly, we think, in a long line of decisions that judgments in criminal cases ought not to be reversed for errors which do not materially injure the accused. *Wood v. State*, *supra*; *Galvin v. State*, *supra*; *Clayton v. State*, *supra*; *State v. Bowman*, 103 Ind. 69; *Henning v. State*, *supra*; *Trout v. State*, 107 Ind. 578; *Phillips v. State*, 108 Ind. 406. Therefore the judgment is affirmed.

HALSTEAD v. JESSUP.

[No. 18,466. Filed March 18, 1898.]

CONTRACT.—Sale.—Forfeiture.—Where by a contract of sale the purchaser of certain timber is given four years to remove it, such purchaser does not forfeit his right to remove the timber after the expiration of four years, in the absence of a forfeiture clause in the contract.

From the Greene Circuit Court. *Reversed.*

Davis & Moffett, for appellant.

Emerson Short, for appellee.

Halstead v. Jessup.

HACKNEY, J.—The questions in this case depend upon the construction of a contract in which it was recited that “Delos Root owns six hundred (600) acres of land in Greene county, in the State of Indiana, at or near what is known as Johnstown on Eel River.” It was further stipulated that Root thereby sold to appellant and another the oak timber on said land for a stipulated price, payable in installments, and it was finally provided that said parties were “to have four years to take off said oak timber” and were to take it clean. After the lapse of four years, the appellant owning the contract, and the appellee, owning the lands, appellant sought to remove a portion of the timber included in the contract, and was denied the right to do so by the appellee. The complaint alleged the payment of the agreed price for said timber, and that the appellee purchased said land with the full knowledge of appellant’s ownership of the timber. It was alleged also that portions of the timber had been cut, and was, at the time appellee denied appellant the right to take the same, upon said lands, and that other portions remained standing in the trees.

The suit was for the recovery of the value of the timber so cut and that so standing. The trial court, by its rulings in striking out allegations of the complaint, and in excluding evidence of the value of the standing timber, accepted the theory that the contract, as to the standing timber, had expired by the limitation of the time mentioned therein, and that the appellant had forfeited the timber.

Counsel devote much of their discussion to the rules concerning stipulations of time in contracts, and when such stipulations are of the essence of the contract, and when they are not. If the time stipulation in

Halstead v. Jessup.

the contract before us were stated as a condition precedent to the ownership of the timber, it would be at least plausible to say that title did not pass without compliance. It is not so stated, however, and cannot be tortured into a condition relating to title, either precedent or subsequent. It merely affirmed the privilege of taking the timber within four years, and contained no forfeiture clause with reference to the timber, the money paid, or the right to go upon the land. That the sale of the timber was complete is not made a question. That the timber was not purchased as a part of the appellee's purchase, he then having knowledge of appellant's ownership thereof, is not doubted, and the only question between the appellant and appellee, upon the terms of the contract, was as to the appellant's right, after the expiration of the four years, to go upon the land and take possession of the timber. By the denial of this right, and the retention of the timber, the appellant was certainly damaged to the extent of the value of the timber.

The law does not favor forfeitures, and will not enforce them in the absence of clearly stated conditions of forfeiture. Here, as we have said, there is no stated condition of forfeiture. If by delay in taking the timber, after the period named, damage should accrue to the owner of the land, it could not be questioned that such damage could be recovered. But it would be manifestly unjust that mere delay should forfeit both the appellant's money and his timber, and that the appellee should become the owner of the timber upon the strength of an implied forfeiture.

Many, if not all, executory contracts, containing provisions as to time for performance, are construed with reference to the intention of the parties, and to ascertain if it was meant to make such provisions

Seisler v. Smith et al.

conditions upon which the right to enforce the contracts depended. *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593, and note; Beach Modern Law of Contracts, pp. 743, 747, 749; Chitty on Contracts (11th ed.), p. 433, note. We have no doubt that contracts of the character of the one before us should be more rigidly construed to find the intention to create a forfeiture. The trial court's theory was wrong. The judgment is reversed with instructions to overrule appellee's motion to strike out parts of the complaint.

SEISLER v. SMITH ET AL.

[No. 18,020. Filed April 27, 1897. Rehearing denied March 18, 1898.]

EQUITY.—*When Court May Disregard Verdict of Jury.*—In an equity case it is within the province of the court to disregard the verdict of the jury and enter its own finding. *p. 90.*

APPEAL.—*Assignment of Error.*—That the court erred in rendering judgment is not a specific assignment of error as contemplated by section 667, Burns' R. S. 1894. *p. 90.*

SAME.—*Conflicting Evidence.*—In support of a paragraph of complaint alleging the existence of a public highway along a certain section line during a certain period, positive evidence as to the existence of such highway was introduced. On the other hand, witnesses for the defense who lived in the neighborhood and were interested in the highways denied the use of a way upon such line, and claimed that the travel had been by devious paths through unenclosed lands, and denied even hearing of or seeing a highway along the line in question. *Held*, that the evidence is conflicting, and cannot be reviewed by the Supreme Court. *pp. 90, 91.*

HIGHWAY.—*Presumption as to Course Of.*—It will not be presumed, because an established highway had some portion of its course upon a section line, that it followed the line throughout. *pp. 91, 92.*

APPEAL.—*When Error Not Available.*—In the absence of a specific objection in the trial court from which it may be known that the objection there urged is the same urged on appeal no available error is shown. *p. 92.*

NEW TRIAL.—*Obstructions of Highway.—Action to Abate as a Nuisance.*—Under section 1076, Burns' R. S. 1894, granting a new trial as of right in actions to quiet title to real estate, a new trial as of right cannot be had where obstructions of a public highway are sought

150	88
154	549
156	566

Seisler v. Smith et al.

to be abated as a nuisance, further maintenance enjoined, and damages claimed. pp. 92, 93.

From the Wabash Circuit Court. *Affirmed.*

M. Winfield, W. G. Sayre, J. D. Conner and G. E. Ross, for appellant.

John Mitchell, N. N. Antrim, W. B. McClintic, J. M. Brown and Loveland & Loveland, for appellees.

HACKNEY, J.—This was a suit by the appellant John Seisler against the appellees George Smith and the Board of Commissioners of Miami county in two paragraphs of complaint. From each paragraph it appeared that the lands of the county, held for a poor asylum, were separated from those of the appellant and the appellee Smith, severally, by a section line running east and west, and those of the appellee lay between the appellant's tract and a prominent highway running north and south. The first paragraph claimed an ancient easement in the nature of a private way over said section line from said highway back to the lands of the appellant, and which in the year 1880, by agreement, had been closed and another way over the lands of Smith substituted, and which substituted way Smith now refuses appellant the right to use. The relief prayed was that the obstructions of the original way be declared a nuisance, and removed, that the appellees be enjoined from obstructing or interfering with the use of said way, and for damages. The second paragraph alleged the existence from 1840 to 1880 of a public highway corresponding with the location of said alleged private way which, during all of said period, had been used by the public generally as a highway, with the knowledge and concurrence of the various owners from time to time of said lands, and that in said latter year the appellees had obstructed said alleged highway with

Seisler v. Smith et al.

fences which they have ever since maintained. The relief prayed was as in the first paragraph, omitting damages. Issue by general denial. Change of venue to the Wabash Circuit Court. Trial by the court, with the submission of special facts to a jury. The findings of facts by the jury were disregarded by the court, and general finding and judgment were rendered in favor of the appellees. The errors assigned are the overruling of appellant's motion for a new trial for cause; overruling his motion for a new trial as of right; "3rd * * * disregarding the verdict of the jury and finding for the appellees," "4th * * * rendering judgment for the appellees."

By agreement, and certainly by the rules of practice, the cause was regarded as of equitable cognizance. It was therefore the province of the court to enter its own finding, and it could not be error to disregard "the verdict of the jury." *Ketcham v. Brazil, etc., Co.*, 88 Ind. 515; *Pence v. Garrison*, 93 Ind. 345; *Farmers' Bank v. Butterfield*, 100 Ind. 229; *Jennings v. Durham*, 101 Ind. 391. That the court erred in rendering judgment is not a "specific assignment" of error, as contemplated by section 667, Burns' R. S. 1894; *Hawks v. Mayor, etc.*, 144 Ind. 343; *McGinnis v. Boyd*, 144 Ind. 393. The questions discussed by counsel, however, arise upon the motions for a new trial. The first of these relates to the sufficiency of the evidence, under the second paragraph of complaint, to prove the existence of a highway upon the line in question. It is conceded by counsel for appellant that this court is denied the power to review a question depending upon conflicting evidence, but, they urge that there is no conflict, since, as they claim, appellant's evidence was of a positive character while that of the appellees, they further claim, was to the effect that the witnesses knew of no such road, and was of a negative character.

Seisler v. Smith et al.

not creating conflict. The evidence upon which appellant relies in this contention is as to the course and extent of travel from the said prominent highway across to the tract owned by him, beginning in the year 1840; as to the removal of timber along said section line between said two points, as defining the way, and the placing of brush and logs in the low wet places. The evidence which is said to be negative and to create no conflict was, much of it, from persons who lived in the immediate neighborhood, and were interested in highways, as township trustees, and interested in the "poor farm," as superintendents and county commissioners, and in some of the lands accessible from any such way, as farmers. These, whose interests and opportunities would probably bring knowledge, deny the removal of timber and the opening of a road; deny the use of a way upon said section line, and claim that there was but an irregular travel by devious paths through the unenclosed and wooded land, and that at some distance south of the section line; and they deny ever hearing of or seeing a highway across said lands. To accept the appellant's contention would be to hold that this evidence was of no force or weight in contradiction of the theory of the second paragraph of complaint. This we cannot do. On the contrary we think the evidence, thus referred to, is conflicting.

It is next complained that the court erred in rejecting as evidence two transcripts of the location and change of highways in the neighborhood of the way in question. Without assuming a radical error in the description of the highway so located, it could have no possible relation to the way in question here. This we have no right to assume. The way, a part of which was vacated and changed, extended east from the prominent highway already mentioned, upon the line

Seisler v. Smith et al.

which, extending west from said prominent highway, divides the lands of appellee Smith and those of the appellant from those of the county. This it is claimed was competent as raising the presumption that such vacated and changed highway had originally continued westward over said dividing line, and upon the line in dispute here. We observe no rule of law or chance which would enforce the presumption that because an established highway had some portion of its course upon a section line that it followed the line throughout. There was certainly no cause for complaint in the action of the court in excluding such records. Further complaint is made of the action of the trial court in admitting in evidence the deposition of a witness residing in Miami county. The evidence showed that the witness was eighty-three years of age, was suffering from partial paralysis, that he did not feel safe to go to the county seat, four miles from his home, without some one to care for him. This evidence tended strongly to establish the disability contemplated by section 407, Burns' R. S. 1894, where it is provided that a deposition may be read in evidence. However, the record discloses but a general objection to the introduction of the deposition, and we are not informed whether the lower court passed upon the same objection that is here urged. In the absence of specific objection in the lower court, from which it may be known that the objection there urged is the same urged in this court, no available error is shown.

The remaining question is as to the refusal of a new trial as of right. In actions to quiet title to real estate, or in actions for ejectment under section 1062, Burns' R. S. 1894, a new trial as of right is allowed by section 1076, Burns' R. S. 1894. This right, however, has been frequently held not to obtain where the plaintiff has associated with any such action, and

Roach et al. v. Clark.

prosecuted it to final judgment, a cause in which a new trial as of right is not allowed. *Bennett v. Closson*, 138 Ind. 542; *Taylor v. Calvert*, 138 Ind. 67; *Richwine v. Presbyterian Church*, 135 Ind. 80; *Wilson v. Brookshire*, 126 Ind. 497; *Bradford v. School Town of Marion*, 107 Ind. 280.

Conceding all that counsel for the appellant claim, that a new trial of right is allowable where the title to an easement is in issue, we have no authority, in view of the decisions just cited, for allowing a new trial as of right where obstructions of a public highway are sought to be abated as a nuisance, further maintenance enjoined, and damages claimed. Such an action or suit would not, as in ejectment (section 1062, *supra*), involve "a valid subsisting interest in real property, and a right to the possession thereof," nor would it involve the title to real estate as contemplated by section 1082, Burns' R. S. 1894. The law does not recognize in an individual a private property interest in a public highway. *Fossion v. Landry*, 123 Ind. 136, and cases there cited. And certainly no such possessory rights as contemplated by the ejectment statute. We find no error in the record.

Judgment affirmed.

ROACH ET AL. v. CLARK.

[No. 18,112. Filed Dec. 15, 1897. Rehearing denied March 18, 1898.]

APPEAL.—Decedents' Estates.—Where the remedy sought by or against a decedent's estate is not provided by the probate procedure act, but must be enforced under the civil code, an appeal is governed by the civil code, and need not be within forty days, as provided by section 2610, Burns' R. S. 1894. p. 96.

WRIT OF ASSISTANCE.—When Should Not Be Granted.—Plaintiff filed his petition for a writ of assistance to obtain possession of lands sold to him at administrator's sale. Defendant filed a cross-action to quiet title, to which plaintiff answered alleging matters of estoppel *in pais* against defendant to assert his claim of title. *Held*,

150	98
156	67
150	98
157	181
150	98
156	325

Roach *et al.* v. Clark.

that the cross-demand and answer thereto departed from the theory upon which the application for the writ could rest, and, when filed, the writ should have been denied. *pp.* 97-99.

From the Elkhart Circuit Court. *Reversed.*

J. D. Osborne and *A. S. Zook*, for appellants.

Anthony Deahl, for appellee.

HACKNEY, J.—The appellee instituted this preceeding, by petition, for a writ of assistance to place him in possession of an eighty acre tract of land alleged to have been purchased by him at a sale by an administrator upon an order of the court below. Thomas W. Roach, responding to the petition, alleged that the decedent, who died the owner in fee simple of said real estate, left him surviving as her widower; that she left no debts contracted before her marriage to him; that he became and continued the owner in fee of one-third of said lands undivided and as tenant in common with other heirs of the decedent; that the appellee's claim of title rested upon proceedings by said administrator to sell said lands to pay debts of the estate of said decedent; that to said proceeding he was a party, but the only allegation as to him in the petition to sell was that he was an heir of the decedent; that he was duly summoned, and made default, and that no issue was made or tried as to him excepting that which arose upon the allegation that he was an heir; that Clark acquired and owns two thirds of the land, undivided, and that he, appellant, owns the remaining third, Clark claiming to own the whole. The prayer was for a denial of the writ, for the quieting of his title to a one-third interest in fee in said lands, and for partition. To this pleading the appellee filed what he termed a reply, in which he set forth that, in the year 1893 Francis E. Baker had owned said lands, and had sold and con-

Roach et al. v. Clark.

veyed them to the decedent, no part of the consideration for the conveyance having been paid, but that she had executed her notes for \$5,350.00, and had secured them by a mortgage on said lands, in which her husband, said appellant, had joined; that Baker had filed his claim against said estate, and which had been allowed by the administrator, with the knowledge of said appellant; that the appellant had sought a loan to pay said mortgage. It is alleged, further, that said appellant knew that the petition sought to sell the entire tract; that the order of the court was to sell the entire tract free from liens; that the notice was to sell; that the appellee believed that he was purchasing the whole; that the deed described the whole, and that the court approved the sale of the whole, he, said appellant, having been present at each of said steps in the sale with such knowledge, and asserting no claim to any interest in said lands; that the appellee would not have bid the sum paid by him, to wit: \$5,000.00, for the two-thirds of said land, and would not have bid upon the whole, nor paid the purchase money and received the conveyance, if appellant had at any of said steps asserted a claim to any part of said lands. The purchase-money notes and mortgage of the decedent are exhibited, the petition to sell is made part of the pleading by reference, and the order of sale and deed are filed also as exhibits. A demurrer to this reply was overruled, and exception reserved, and that ruling is assigned as error. A trial resulted in a special finding by the court, with conclusions of law, holding (1) appellee estopped to assert title through the lien of the mortgage; (2) appellant estopped to assert title or right by reason of his acts; (3) appellee entitled to the writ of assistance. The appellant, Roach, assigns as error also the second and third conclusions stated, and the appellee

Roach et al. v. Clark.

assigns by way of cross-error said first conclusion of law.

The appellee moves to dismiss the appeal for the reason that it was not perfected within forty days from the rendition of judgment. This motion is made upon the theory that the proceeding was connected with the settlement of an estate, in that it was to make effective the sale by the lower court in the exercise of its probate jurisdiction, and that since appeals in matters connected with a decedent's estate must be taken within forty days, as provided by statute, sections 2609, 2610, Burns' R. S. 1894, therefore the appeal must be dismissed.

Where the remedy sought by or against an estate is not provided by the probate procedure act, but must be enforced under the civil code, the appeal is not under sections 2609, 2610, *supra*, but is under the civil code. *Simmons v. Beazel*, 125 Ind. 362; *Walker v. Steele*, 121 Ind. 436; *Koons v. Mellett*, 121 Ind. 585; *Wright v. Manns*, 111 Ind. 422; *May v. Hoover*, 112 Ind. 455; *Heller v. Clark*, 103 Ind. 591; *Claypool v. Gish*, 108 Ind. 428; *Dillman v. Dillman*, 90 Ind. 585; *Yearley v. Sharp*, 96 Ind. 469; *Hillenberg v. Bennett*, 88 Ind. 540; *Merritt v. Straw*, 6 Ind. App. 360; *Louisville, etc., R. W. Co. v. Etzler*, 4 Ind. App. 31; *Galentine v. Wood*, 137 Ind. 532; *Harrison Nat'l Bank v. Culbertson*, 147 Ind. 611. The remedy here invoked is not provided by the probate procedure act, but is of a purely equitable character enforceable within the chancery jurisdiction of the courts. 2 Ency. of Pl. and Pr. 975; Beach Mod. Eq. Pr., section 897; Gibson's Suits in Ch., section 628; Daniell's Ch. Pr. (8th ed.), sections 1056, 1062, 1063 and 1742; *Sharp v. Carter*, 3 P. Wms. 375; *Pelham v. Newcastle*, 3 Swanst. 289, note; *Payne v. Baxter*, 2 Tenn. Ch. 518; *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. 245, 37 N. W. 801. As an

Roach et al. v. Clark.

independent remedy, therefore, the practice must be deemed to exist under the general code, since the appeals therein provided obtain as to equitable as well as legal proceedings, where special provision is not made. That the settlement of a decedent's estate has remote connection with the remedy, as we have seen from the authorities cited, does not control. That remote connection was not such as to require that the estate should be made a party, and the final settlement need not be delayed because of the appeal. The appeal, having been within the period prescribed by the civil code, was, we have no doubt, in time, and should not be dismissed.

The outline of the pleadings, as we have shown, discloses an application for the writ of assistance, a cross-action to quiet title, and an answer thereto alleging matters of estoppel *in pais* against the appellant to assert his claim of title. Upon the cross-complaint the trial court held, by its first conclusion of law, that the appellee obtained no rights as a lienor under the mortgage, the notes having been filed and allowed as a claim against the estate only, and the purchase money paid by the appellee having, with that from another source, paid the mortgage debt. Upon the allegations of the answer to the cross-complaint the court held, by the second conclusion, that the appellant, by acts *in pais*, had estopped himself to assert the title claimed by him. By the third conclusion the court held that the writ should issue.

The sufficiency of the answer, called a reply, and the correctness of the second and third conclusions of law, are pressed upon us, and involve inquiries, as they seem to us, remote from the proper or possible scope of a proceeding for the writ of assistance. "It is commonly declared that the issuance of a writ of assist-

Roach *et al.* v. Clark.

ance rests in the sound discretion of the court, and that it is used only when the right is clear, when there is no equity or appearance of equity in the defendant, and when the sale and proceedings under the decree are beyond suspicion; and it is certainly not customary to issue the writ where there is a *bona fide* contest as to the right to the possession of the land under the sale, or where the rights of the respective parties have not been fully adjudicated in the principal suit." 2 Enc. Pl. and Pr., 980; *Van Meter v. Borden*, 25 N. J. Eq. 414; *Schenck v. Conover*, 13 N. J. Eq. 220, 78 Am. Dec. 95; *Hooper v. Yonge*, 69 Ala. 484; *Blauvelt v. Smith*, 22 N. J. Eq. 32; *Thomas v. De Baum*, 14 N. J. Eq. 37; *Wiley v. Carlisle*, 93 Ala. 238, 9 South. 288; *Barton v. Beatty*, 28 N. J. Eq. 412; *Knight v. Houghtalling*, 94 N. C. 411; *Frazier's Admrs. v. Beatty*, 25 N. J. Eq. 343; *Stanley v. Sullivan*, *supra*; *Ramsdell v. Maxwell*, 32 Mich. 285; *Flowers v. Brown*, 21 Ill. 270; *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. 170.

The holding of the lower court was not that the appellant was estopped by the proceeding to sell, as an estoppel by record or decree, nor by the allowance of Baker's claim against the estate, but by acts *in pais*. Upon this holding, the writ was ordered not because the proceeding and sale, in probate, were beyond suspicion, or were fully adjudicated, nor because there was no appearance of equity in the appellant's claim of title, but it was ordered upon independent proceedings, in the nature of an action at law to quiet title, and upon the concession of title originally, but which had been lost by acts *in pais*. The application for the writ of assistance could never have been recognized to supply a remedy to quiet title concurrent with the statutory remedy. It was designed rather as a summary remedy for the enforce-

Blair v. Curry *et al.*

ment of a right already determined by a court of equity, and which determination one of the parties refuses to recognize, and the other may enforce without resort to a new suit or action. But, where the rights of the parties have not been so determined as to render further litigation necessary, the application for the writ may not be the basis of such further litigation. The necessity appearing, upon application for the writ, the court will deny the writ, and the parties will be left to the forum having jurisdiction of the question unsettled.

The cross-demand and the answer thereto departed from the theory upon which the application for the writ could rest, and, when filed, the writ should have been denied. The error, therefore, in granting the writ, should be carried back to the application, and intermediate proceedings should be vacated and held for naught. *Equitable Accident Ins. Co. v. Stout*, 135 Ind. 444, 457. The judgment is reversed, with instructions to sustain the demurrers to the reply and answer, and to deny the writ.

BLAIR v. CURRY ET AL.

[No. 18,308. Filed April 6, 1897. Rehearing denied Mar. 18, 1898.]

APPEAL.—Trial by Jury.—Waiver.—A jury trial is waived by failure to demand it at the time of trial; a demand at a previous term of court is insufficient. *pp. 100, 101.*

SAME.—Exception to Conclusions of Law Admits Correctness of Findings.—New Trial.—Exception to conclusions of law is an admission that the facts have been fully and correctly found. The remedy to correct the findings of the court is by motion for new trial. *p. 101.*

SAME.—Record.—Agreement of Attorneys to Cure Defects.—An agreement in writing, signed both by the counsel for appellant and appellee, waiving deficiencies in the record, cannot be considered, where such agreement, though copied in the record, is not made a part thereof by order of court or bill of exceptions. *pp. 102-104.*

SAME.—Record.—Bill of Exceptions.—The bill of exceptions controls when there is a contradiction between it and the record. *pp. 103, 104, 106.*

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Blair v. Curry et al.

EQUITY.—Action to Compel Production of Sheriff's Certificate, when not Triable by Jury.—An action by the surviving heirs of the deceased assignee to compel defendant to produce to the sheriff the certificate of a sheriff's sale of real estate, in order that the sheriff might execute a deed thereon to the plaintiffs, is an equitable proceeding, and not triable by jury. *p. 107.*

From the Fayette Circuit Court. *Affirmed.*

Thomas D. Evans, for appellant.

L. H. Stanford, G. W. Pigman, Reuben Conner
and *J. M. McIntosh*, for appellees.

MCCABE, J.—The appellee sued the appellant in the Union Circuit Court to compel him to produce a certificate of a sheriff's sale of eighty acres of land in Union county, in order that the sheriff of that county might execute a deed thereon to the appellees, as the sole surviving heirs of the deceased assignee of said certificate. The venue was changed to the Fayette Circuit Court where the issues formed upon the complaint were tried before the Hon. David W. McKee, as special judge, resulting in a special finding on which conclusions of law were stated. Pursuant to the conclusions of law, the court rendered judgment for the plaintiffs. The errors assigned call in question the action of the court in overruling a demurrer to the complaint for want of sufficient facts, the conclusions of law, and in overruling appellant's motion for a new trial. The appellant's brief points out no objection to the sufficiency of the complaint, and hence such alleged insufficiency is waived.

One of the grounds specified in the motion for a new trial was the action of the trial court in overruling appellant's motion for a jury trial of the cause. A bill of exceptions shows that a demand was made for a jury trial by the appellant on the ninth judicial day of the May term for 1895, which demand was refused at that time. And such bill shows that the

Blair v. Curry et al.

cause was tried at the October term for 1895, by the court without a jury. But there is no showing in the bill that any demand or request was made at that term for a jury. It is not clear from the other parts of the record but that the trial took place at the May term. If even the other parts of the record made it appear that the trial took place at the May term, the bill of exceptions in contradiction thereof showing that it took place at the October term controls. *State v. Flemons*, 6 Ind. 279; *Carmichael v. Shiel*, 21 Ind. 66; *Indiana, etc., R. W. Co. v. Adams*, 112 Ind. 302. Therefore, at the time this record shows the trial took place, there was no demand or request made that the cause be tried by a jury, or that a jury be impaneled to try the cause. Failure to demand a jury at the time the trial begins is a waiver thereof. *Madison, etc., R. R. Co. v. Whiteneck*, 8 Ind. 217, 218; *Jarboe v. Severin*, 112 Ind. 572, 574; 2 Elliott's Gen'l Prac. 506. We intimate no opinion whether the case was one in which a jury trial was demandable or not.

The appellant in his brief points out no valid objection to the conclusions of law. The only objection made to the conclusions of law is stated by appellant's brief thus: "We think that the conclusion of law upon the facts found was erroneous, for the reason that the court failed to find many of the material facts alleged in the complaint, and introduced in evidence, * * * and * * * failed to find any of the facts set out in the complaint and answer with reference to the ownership of the land under the Blair will." The exception to the conclusions of law is an admission that the facts have been fully and correctly found. *Lockwood v. Dills*, 74 Ind. 56; *Robinson v. Snyder*, 74 Ind. 110; *Gregory v. Van Voorst*, 85 Ind. 108; *Maxwell v. Vaught*, 96 Ind. 136; *Kinsey v. State, ex rel.*, 98 Ind. 351; *State, ex rel., v. Emmons*, 99 Ind.

Blair v. Curry et al.

452; *Shoemaker v. Smith*, 100 Ind. 40; *State, ex rel., v. Crawfordsville, etc., Turnpike Co.*, 102 Ind. 283; *Hedges v. Keller*, 104 Ind. 479; *Bass v. Elliott*, 105 Ind. 517; *Kurtz v. Carr*, 105 Ind. 574; *Burdge v. Bolin*, 106 Ind. 175; *Lake Erie, etc., R. W. Co. v. Griffin*, 107 Ind. 464; *Wynn v. Troy*, 109 Ind. 250; *Center Tp. v. Board, etc.*, 110 Ind. 579; *Gardner v. Case*, 111 Ind. 494; *Warner v. Sohn*, 112 Ind. 213; *Neisler v. Harris*, 115 Ind. 560; *State, ex rel., v. Vogel*, 117 Ind. 188; *Blair v. Blair*, 131 Ind. 194; *McCrary v. Little*, 136 Ind. 86; *Fulh v. Beaver*, 136 Ind. 319.

If all the facts within the issues that are established by the evidence are not found, or if facts are stated in the special finding not established by the evidence, the remedy is by a motion for a new trial, and not an exception to the conclusions of law or a *venire de novo*. *First Nat'l Bank v. Carter*, 89 Ind. 317, 323; *Quick v. Brenner*, 101 Ind. 230, 235; *Beeter v. Sellers*, 102 Ind. 458, 460; *Hamilton v. Byram*, 122 Ind. 283; *Lake Shore, etc., R. W. Co. v. Van Auken*, 1 Ind. App. 492, 497; *Chicago, etc., R. R. Co. v. Barnes*, 2 Ind. App. 213, 218.

The motion for a new trial assigns as reasons therefor that the finding is contrary to law and the evidence, and is not sustained by sufficient evidence. Not one single reason is stated in appellant's brief why the finding is contrary to law, or why it is contrary to or not sustained by the evidence, nor is there any attempt to do so in the appellant's brief. If there was such an attempt sufficient to rescue the case from the well known rule that such failure works a waiver of the alleged error, we could not consider the question, because the formal conclusion of the bill of exceptions instead of showing that the bill contains all the evidence given in the cause, as must be the

Blair v. Curry et al.

case before we can consider its sufficiency, it shows affirmatively that it does not contain all the evidence in the cause. It shows that the larger part of the evidence has been omitted, and that evidence was absolutely essential in the cause. This defect is attempted to be obviated by an agreement in writing, signed by the counsel on both sides, to the effect that such omission was caused by the loss of the documents which had been omitted from the bill of exceptions, and to the further effect that the hearing of the cause in the appellate court shall be considered as regular in every respect, and no advantage shall be asked or taken of the fact that said evidence is not copied into the record. There has been no attempt on the part of appellees' counsel to violate such agreement, if any such was made. But the paper purporting to be such agreement is a collateral paper, and not a part of the record, except made so by a bill of exceptions or order of court. Section 662, Burns' R. S. 1894 (650, R. S. 1881).

There was no bill of exceptions or order of court making the same a part of the record, but it is simply copied into the transcript. That did not make it a part of the record. Hence we cannot recognize it as having any force or effect, because not a part of the record. We do not mean to intimate that it would have cured the defect in the bill of exceptions if it had been properly brought into the record. We do not decide that question. The attempt has been made to obviate this defect in the bill of exceptions by another agreement in writing, signed by the counsel on both sides, and approved by the special judge on February 12, 1896, the original of which is attached to the transcript, and was so attached long after the transcript was filed in this court on December 23, 1895. Such agreement is to the effect that in as

Blair v. Curry et al.

much as the stenographer had found the several documents that had been put in evidence, and subsequently lost, that such stenographer might insert copies of said documents in said record, "the same to be considered by your court without objection on the part of either of us." Appeals must be tried by the record, and by the record determined. Elliott App. Proc., section 186, and authorities there cited. The agreement mentioned is no part of the record. And, even if it were, it is not competent for parties, by agreement, to change a bill of exceptions or other part of a record after it has been filed in this court, even though the judge below, or the special judge who had tried the case, should approve of such agreement. Such an agreement would make the record in this court an entirely different record from what it was in the trial court. That cannot be done. Elliott's App. Proc., section 188, and authorities there cited. *Evans v. Schafer*, 38 Ind. 92; *Thames, etc., Co. v. Beville*, 100 Ind. 309; *Blizzard v. Blizzard*, 48 Ind. 540.

It appears from the transcript that twenty-one pages, purporting to be copies of deeds and a judgment, have been pasted into the bill of exceptions pursuant to the agreement mentioned since the transcript was filed here. The trial judge has certified in his conclusion to the bill of exceptions that these documents are not in the bill. That was the record when the case was at an end in the trial court. Such bill of exceptions imports absolute verity, and cannot be contradicted in this court. *Beavers v. State*, 58 Ind. 530; *Walls v. Anderson, etc., R. R. Co.*, 60 Ind. 56; *Thames, etc., Co. v. Beville, supra*. The agreement of the parties cannot make a different record in this court from that which was made in the trial court. *Burkan v. McElfresh*, 88 Ind. 223; *Burdick v. Hunt*,

Blair v. Curry et al.

43 Ind. 381. The evidence not being in the record, we cannot consider whether the finding is unsupported thereby or not. Judgment affirmed.

ON PETITION FOR REHEARING.

MCCABE, J.—Counsel complain bitterly because we held in the original opinion that the refusal of the request for a jury trial did not occur at the term of court at which the trial occurred, and that as no jury was demanded at the term at which the trial took place, the right to a jury trial was waived by the appellant. On this petition counsel quote the order-book entry, which we may concede shows that the trial of the issues took place at the May term, 1895, and immediately following the refusal of appellant's demand for a jury trial, and shows that such trial, so far as the evidence and argument is concerned, according to said order book, was concluded at the May term, 1895, running into June, 1895. But the bill of exceptions taken by appellant, and doubtless drawn up by counsel now so harshly assailing this court, states the order of the events differently. This circumstance the irate counsel finds it quite to his purpose to ignore, and it was upon that express ground that the original opinion based the holding that there was no demand for a jury at the term at which the trial occurred.

Counsel, in preparing the bill of exceptions on behalf of the appellant, seems to have entertained a fear that this court could not understand the order of events of the trial from the order book entry, and hence was very specific, and placed that matter beyond all doubt or cavil, if a bill of exceptions imports verity. It reads thus: "Be it remembered that on the day of 29th May, 1895, it being the ninth judicial day of the spring term, of the Fayette Circuit Court,

Blair v. Curry et al.

the Honorable David W. McKee, special judge, presiding, the following proceedings were had and held: James Blair, by his attorney, Thomas D. Evans, filed a written motion to this court asking that the cause be tried by a jury, which motion, after argument, was overruled, to which ruling of the court the said James Blair at the time excepted. Be it further remembered that this cause coming on to be heard was heard, before the said Judge on the 26th day of October, 1895, upon the issues formed, when and where the plaintiff and defendants, to maintain the issues introduced the evidence which is set out in the longhand manuscript reports of the reporter." We cited a long list of the decisions of this court in our former opinion, holding that where the bill of exceptions contradicts the order book entry as to the order of events, that the bill of exceptions importing absolute verity must control. The law compelled us to rule as we did on this point, and not because we had any choice as to which party should prevail in this court. If the bill of exceptions is so framed as to make the record speak untruly, it is not the fault of this court, but undoubtedly is the fault of appellant's counsel.

It is also urged with great fervor that we erred in holding that a large batch of documentary evidence, attempting to be injected into the bill of exceptions, and into the transcript after the same had been filed in this court, could not be legally done so as to make it a part of the record, even though there was an agreement signed by the attorneys on opposite sides that it might be so injected. And we are cited to the statute providing that an attorney has power "to bind his client in an action or special proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." Section 980, sub. 1, Burns' R. S. 1894 (968, R. S. 1881). There

are many agreements that attorneys cannot make under this statute. As a general thing they cannot make an agreement that is valid in a case if the client could not make the same contract binding. Accordingly it has been held that an attorney cannot, by agreement, extend the time in which an appeal may be taken (*Louisville, etc., R. W. Co. v. Boland*, 70 Ind. 595); nor by agreement extend the time for filing a bill of exceptions (*Goben v. Goldsbury*, 72 Ind. 44). *Truitt v. Truitt*, 38 Ind. 16, was a very different case from the one before us. That was an agreement entered upon the record in the trial court concerning matters occurring during the progress of the cause in the trial court. But, says an eminent author, "a stipulation between counsel that the testimony as taken by the court stenographer shall be the record in the case, will not supply the place of a bill of exceptions duly authenticated and certified." Weeks on Attorneys, section 236a. To the same effect, and deciding the precise point now in question against appellant's contention, is *Davis v. Union Trust Co.*, *ante*, 46.

There never was anything in the vehement complaint about the refusal of appellant's demand for a jury trial. The complaint disclosed that the plaintiff's mother purchased certain real estate at sheriff's sale for which a certificate in due form was issued by the sheriff to her. That she afterwards died intestate the owner of said certificate, leaving plaintiffs her sole heirs. That she left no debts, and that the defendant, through the death of the certificate owner, had gotten possession thereof without any title to the same. That the year for redemption had expired, and the sheriff of the county, who is also made a defendant, refused to make a deed to appellees as the sole heirs of the deceased owner thereof unless the certificate was produced, and that defendant had on a

Lewis, Administrator v. Watkins.

proper demand refused to produce it. Prayer that defendant be compelled to produce the certificate to the sheriff, and that such sheriff thereupon be compelled to execute a deed to them as required by the terms of said certificate. Such a complaint made a case that was of exclusive equitable jurisdiction prior to June 18, 1852, and therefore was not triable by jury. There was no error in refusing the appellant's demand for a jury trial. Petition overruled.

LEWIS, ADMINISTRATOR, v. WATKINS.

[No. 18,818. Filed March 18, 1898.]

DESCENT AND DISTRIBUTION.—*Widow's Share in Real Estate.—Mortgage.*—Where a widow's interest in the real estate of her deceased husband is sold and conveyed to pay her husband's debts secured by a mortgage thereon, she is entitled, as against creditors, to be reimbursed for the full value of her share therein out of the personal assets of the estate.

From the Hendricks Circuit Court. *Affirmed.*

Johnston & Johnston, R. W. Harrison, F. E. Gavin, C. F. Coffin and T. P. Davis, for appellant.

G. W. Paul and H. D. Van Cleave, for appellee.

MONKS, J.—Russell B. Watkins died in December, 1894, in Montgomery county, Indiana, leaving appellee, Caroline Watkins, his widow, and two daughters surviving him. Daniel Lewis was appointed administrator of his estate, and filed in the Montgomery Circuit Court a petition to sell two hundred acres of real estate, which the petition alleged was all the real estate owned by said decedent at the time of his death. The widow and children were made defendants to said petition, to which the widow, Caroline Watkins, filed an answer. The widow also filed a cross-complaint in which she alleged that she was the owner in fee simple of one hundred acres of said real estate,

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Lewis, Administrator v. Watkins.

and asking that her title thereto be quieted, etc. The court made a special finding of facts, and stated conclusions of law thereon. The court found that said two tracts of real estate were incumbered by mortgages in the execution of which the widow, Caroline Watkins, had joined with the deceased, her husband.

The court stated as a conclusion of law, in substance, that Caroline Watkins was the owner in fee simple of the one hundred acres of land described in her cross-complaint, as against the heirs of said decedent, but as against the creditors of the decedent she was estopped from setting up any claim or right to the same, and that the whole two hundred acres described in the petition, except the interest therein which said Caroline Watkins inherited under the law ^{as} widow of said deceased, was liable and subject to ~~sale~~ to pay the indebtedness of said deceased. The court rendered judgment upon said special finding that the deceased at the time of his death owned one hundred acres of said real estate, as described in the pleadings, and that the widow, Caroline Watkins, was the owner of the undivided one-third thereof; and that said Caroline Watkins was the owner in fee simple of the other one hundred acres described in her cross-complaint, subject to certain liabilities set forth in the judgment, and, subject only to these provisions, that the title of said Caroline Watkins be quieted in her as to all parties to said suit, and all persons who may claim under, by, or through them. The court entered an order for the sale of the said first mentioned one hundred acres, and that all the debts and expenses of administration that may remain unpaid after the application of the personal estate of \$1,150.00 be paid out of the proceeds of such sale, and the remainder, if any, be paid over to said Caroline Watkins as her absolute property. No order was entered for the sale of

Lewis, Administrator v. Watkins.

the one hundred acres the title to which was quieted in said widow.

The one hundred acres ordered sold, was sold by the administrator for cash, and the sale reported and the deed made to the purchaser. Out of the proceeds of said sale the administrator of said estate paid the two mortgages in the execution of which said widow had joined. Afterwards appellee, the widow, brought this proceeding against appellant, the administrator of said estate, in the Montgomery Circuit Court, and asked that said administrator be ordered to pay her one-third of the gross proceeds of the sale of said real estate. Appellant's demurrer to the petition for want of facts was overruled. An answer in several paragraphs was filed by the appellant, to which appellee filed a reply. On the trial of said cause the court found for appellee, and ordered that appellant pay to appellee, out of the funds of said estate in his hands, the one-third of the gross proceeds received for said one hundred acres of real estate, of which said appellee was the owner of the undivided one-third.

It is settled law in this State that the interest a widow inherits in the real estate of which her husband dies seized, as against creditors, is free from all demands of such creditors, and that an order of court to sell such interest to pay the debts of the estate, unless secured by a mortgage or other lien on said real estate which binds her interest therein, and the sale thereof, are absolute nullities, and if such interest is sold the purchaser takes no title thereto. *Wendell v. Trotter*, 127 Ind. 332; *Roberts v. Lindley*, 121 Ind. 56; *Hutchinson v. Lemcke*, 107 Ind. 121; *Pepper v. Zahn-singer*, 94 Ind. 88; *Matthews v. Pate*, 93 Ind. 443; *Compton v. Pruitt*, 88 Ind. 171; *Armstrong v. Cavitt*, 78 Ind. 476; *Unfried v. Heberer*, 63 Ind. 67; *Elliott v.*

Lewis, Administrator v. Watkins.

Frakes, 71 Ind. 412; *Hanlon v. Waterbury*, 31 Ind. 168; sections 224, 225, 227, 228, Henry's Probate Law.

If, however, the widow consents to such sale by the administrator under order of the court, and afterwards receives her share of the purchase money, she would be estopped from disputing the validity of the sale. *Pepper v. Zahnsinger*, *supra*; *Smock v. Reichwine*, 117 Ind. 194.

There are only two cases in which the court having probate jurisdiction has the power to order the sale of the whole real estate of a decedent, including the widow's interest, on a petition of the executor or administrator to sell the decedent's real estate to pay the debts of the estate, and these are provided for by sections 2503, 2504, Burns' R. S. 1894 (2348, 2349, Horner's R. S. 1897). Section 2503 (2348), *supra*, provides that when it is reported by the commissioners appointed to make partition that the widow's interest cannot be set off to her in severalty without damage to the owners, then the court may direct the whole of the real estate, including the widow's interest, to be sold by the executor or administrator, and the full share of the widow in the gross proceeds of the sale paid to her on confirmation of the sale. Under section 2504 (2349), *supra*, if the interest of the widow in the real estate of the decedent be liable to sale to satisfy a lien on such real estate, the court has the power in proceedings for the sale of real estate for the payment of debts, to direct the sale of the whole thereof, including the widow's interest, to discharge such lien, and to order the payment to the widow of her share or such part of her share of the gross proceeds of the sale as shall remain after satisfying such lien.

Under each of these sections the widow's interest may be sold by order of court whether she consent

Lewis, Administrator, v. Watkins.

or not; but when the same is sold under the provisions of section 2503 (2348), *supra*, her full share out of the gross proceeds must be paid to her, and when the same is sold under section 2504 (2349), *supra*, her full share of the gross proceeds must be paid to her if so much remains after satisfying the liens; if not, then what remains after satisfying the same must be paid to her. But in either case such share is no more liable for the payment of the debts of the deceased, except the liens, when sold under section 2504 (2349), *supra*, than was the land out of which the same was derived. All the rules stated in regard to the absence of power in the court to order the sale of the widow's interest in her deceased husband's lands apply with equal force to the power of the court to dispose of her share of the proceeds after the sale is made under sections 2503, 2504 (2348, 2349), *supra*. When the sale is made under section 2504 (2349), *supra*, and the liens which bind her interest are satisfied, she is entitled to her share of the gross proceeds of the sale, if so much remains, and if not, then she is entitled to all that remains, and any order of the court directing a contrary disposition of her share of the proceeds is void.

In this case it was the duty of the administrator to pay out of the \$1,150.00 personal property in his hands enough of the liens on the hundred acres of land sold so that the widow's share of the gross proceeds of the sale would remain after the satisfaction of said liens, to be paid to her. *Shobe v. Brinson*, 148 Ind. 285. And, under the rule in this State, the order of the court that any part of appellee's share of the gross proceeds of the sale of said hundred acres of land be applied to the payment of any debts or cost of said estate, except the satisfaction of the two mortgages thereon, was void, and not binding on any one. The only jurisdiction given the court was to order the sale of the

The Chicago and Erie Railroad Company v. John, Treasurer, et al.

land, including the widow's interest, and that the liens binding her interest be paid, and the remainder was beyond the court's jurisdiction to dispose of except to order it paid to her. Any other order was void.

It is urged that the complaint does not show that the appellee's interest, as widow, in said one hundred acres was sold by the administrator, and that, if it was not sold, she is not entitled to any part of the proceeds of said sale. The complaint sets up facts showing that the court was authorized by section 2504 (2349), *supra*, to sell one hundred acres of land, including the widow's interest therein, to pay mortgage liens thereon in the execution of which appellee had joined. We think it sufficiently appears that said real estate, including appellee's interest as widow in said real estate, was sold. The case of *Compton v. Pruitt*, 88 Ind. 171, cited by appellant, is not, therefore in point. What we have said disposes of the errors assigned. Finding no available error in the record, the judgment is affirmed.

THE CHICAGO AND ERIE RAILROAD COMPANY v. JOHN,
TREASURER, ET AL.

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[No. 18,142. Filed Dec. 8, 1897. Rehearing denied March 18, 1898.]

TAXATION.—*Personal Property of Railroad Company.*—*Assessment.*—

Notice.—Where, under sections 8501, 8502, Burns' R. S. 1894, a railroad company returns a schedule and valuation of its personal property to the county auditor, and such auditor submits the same to the assessor to be assessed, the railroad company is not entitled to notice before the assessor can make the assessment at a greater valuation than that returned by the company.

From the Huntington Circuit Court. *Affirmed.*

W. O. Johnson and Kenner & Lesh, for appellant.

John Q. Cline, for appellees.

The Chicago and Erie Railroad Company v. John, Treasurer, et al.

HACKNEY, J.—The appellant instituted this suit, in two paragraphs of complaint, to enjoin the treasurer and auditor of Huntington county from maintaining upon the tax duplicate and enforcing taxes on an increased valuation of its personal property, tools, etc., in Huntington township, and the city of Huntington, in said county, for the year 1893. The lower court sustained the demurrer of the appellees to each paragraph of the complaint, and that ruling presents the only question in this court. The theory of each paragraph was that the township assessor had returned to the county auditor a greater valuation than that made by the company, and had not, prior to making such valuation, given the company notice to show cause why such greater valuation should not be returned, and that, therefore, the valuation so made by the assessor is void.

By section 8501, Burns' R. S. 1894, railway companies return their schedules and valuations of such property to the county auditor and thereupon, under section 8502, Burns' R. S. 1894, the auditor submits to such assessor a copy of that part of the return so made, which includes the property here in question, and it is in said section provided that "such property shall be listed and assessed by such assessor." By section 8523, Burns' R. S. 1894, the assessor is required to return to the county auditor, under oath, the value fixed by him upon such property, such return to be made on or before the first Monday of June. By section 8532, Burns' R. S. 1894, the county board of review is required to meet in July, after two weeks notice, and it has power to hear complaints concerning and to correct the lists and valuation of such property. By these provisions the class of property in question is listed, assessed, returned, and corrections

The Chicago and Erie Railroad Company v. John, Treasurer, et al.

in valuation are made. But it is claimed by the appellant that by the provisions of section 8526, Burns' R. S. 1894, she was entitled to notice of the increased valuation fixed by the assessor; that the failure to give such notice deprived her of knowledge and opportunity to apply to the board of review to correct the valuation so fixed, and, in consequence, the action of the assessor was void. That section provides that "Whenever the township assessor, prior to the filing of his return with the county auditor, shall discover or receive credible information, or have reason to believe that any real or personal property has been omitted in the assessment of any year or number of years from the listing and assessing, or from the tax duplicate, or that any person, company or corporation has from any cause omitted to list any of his, her or their property, or has not returned the full value thereof or that the tax for which such property was liable from any cause was not paid, or that any real estate, by reason of defective description thereof, has failed to pay taxes for any year, or number of years, he shall proceed to correct his list and add such property to the assessment, so that such property and the owner thereof may be charged with the proper amount of taxes thereon; but, before making such correction or addition, if the person claiming to own such property or occupying it, or in possession thereof, resides in the county he shall give the person claiming to own, or occupying, or having in possession such property, notice in writing of his intention to list such property, describing it in general terms, and requiring such person to appear before him at his office, or place of business, at a specified time within ten days after giving such notice, to show cause, if any, why such property should not be listed and placed on the assessment book; and if the party so notified does not appear,

The Chicago and Erie Railroad Company v. John, Treasurer, *et al.*

or if he appear and fail to show any good and sufficient cause why such assessment should not be made, such listing shall be made, and the particular years for which such property should be listed shall be noted. Such assessor shall also file with the county auditor a statement in writing of his reasons for making such correction or assessment, and the facts or evidence upon which such reasons were based; the arrearages of tax which might have been assessed shall be charged against such person and property by the county auditor." It is not necessary that we should determine whether this section applies to the listing and assessing for the current year or to arrearages, for it is manifest that it applies to corrections and not to the making of original assessments. If, as we have pointed out, the assessor places the primary valuation upon property of the character of that in question here, notice to the owner could not be regarded as essential. That such was the intent of the statute is made manifest from the requirement that the list of the company returned to the auditor shall reach the auditor, not through the assessor, as in other cases, but directly from the company, and shall then be placed in the hands of the assessor to make the assessment. The fact that the company is required to place a valuation on the property is not that it may become absolute, but that it may serve as evidence to the assessor. It is enough, perhaps, when we have said that section 8526, *supra*, applies to corrections, and not to the primary valuation of property; however, if notice were required before the assessor could place his valuation on the property, it does not appear from the allegations of either paragraph of complaint that any person subject to notice as mentioned in the statute was in the county, and, for that reason, the complaint would be bad. The judgment is affirmed.

Hawkins, Receiver, et al. v. Fourth Nat'l Bank, etc., et al.

HAWKINS, RECEIVER, ET AL. v. THE FOURTH NATIONAL
BANK OF NEW YORK ET AL.

[No. 18,133. Filed March 29, 1898.]

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BILLS AND NOTES.—*Collateral Security.*—A machine company executed to a bank three notes aggregating \$19,000.00, and secured them by collateral with the privilege of substituting other collateral. The bank desired to sell one of the notes, and in order to escape indorsement, had the machine company to execute a new note payable to itself, and indorse the same in blank to the purchaser. The purchaser of the note took it with knowledge that it had been so executed to avoid indorsement, and with the agreement that it was secured by the collateral notes which were held by the bank. The note was renewed at maturity and made payable to the purchaser. *Held*, that the purchaser of the note could enforce a lien on the notes held by the bank as collateral. *pp. 119-124.*

FRAUD.—*A Question of Fact.*—Fraud is a question of fact, and when essential to a cause of action or defense thereto, must be found as a fact, and not left to be inferred as a matter of law. *p. 124.*

BANKS AND BANKING.—*Authority of Cashier to Sell Notes.*—*Presumption.*—Where the facts stated in a special finding show that the cashier of a bank sold a particular note, it will be presumed that the sale was authorized, or was ratified by the board of directors. *p. 125.*

SAME.—*Authority of Cashier to Sell Note.*—*Estoppel.*—Where the cashier of a bank sold a note, and the proceeds were received and retained by the bank, the bank and its receiver are estopped from denying the authority of the cashier to make such sale. *pp. 125, 126.*

SPECIAL FINDING.—*Evidentiary Facts.*—*Venire de Novo.*—Where a special finding includes evidentiary facts which are not sufficient to establish any inferential fact within the issues that is not stated in the finding, a motion for a *venire de novo* is properly overruled. *p. 127.*

From the Marion Superior Court. *Affirmed.*

John W. Kern, for appellants.

Ayres & Jones and J. P. Baker, for appellees.

MONKS, J.—The Fourth National Bank of New York brought this action against the Indianapolis National Bank, Edward Hawkins, receiver of the Indianapolis National Bank, the Eagle Machine Works

Hawkins, Receiver, *et al.* v. Fourth Nat'l Bank, etc., *et al.*

Company and the First National Bank of Knightstown, upon a note executed by the Eagle Machine Works Company to the Indianapolis National Bank, and by it indorsed to said Fourth National Bank of New York, and to enforce a lien on certain notes pledged to secure the same which were in the hands of Hawkins, receiver.

The First National Bank of Knightstown filed an answer to said complaint, and also a cross-complaint against its codefendants and said plaintiff upon a note executed by said Eagle Machine Works Company, alleging that said note was secured by said notes in the hands of Hawkins as receiver. The defendants to said complaint and to said cross-complaint each filed answers thereto.

After issues were joined, the court, at the request of appellants, made a special finding of facts, and stated its conclusions of law thereon, and, over a motion for a *venire de novo* and a motion for a new trial, rendered judgment in favor of the Fourth National Bank of New York, against the Eagle Machine Works Company, and the Indianapolis National Bank, for the amount of said note and interest, and in favor of the First National Bank of Knightstown, against the Eagle Machine Works Company for the amount of the note, principal and interest, sued upon in said cross-complaint; and that said banks recovering said judgments have a lien on the collateral notes held by Hawkins, receiver, and any money collected thereon by him, and that the same be first applied to the payment of certain costs and expenses, and then to the payment of the judgment in favor of the First National Bank of Knightstown, and the interest thereon, and then to the payment of the judgment in favor of the Fourth National Bank of New York and the interest thereon.

Hawkins, Receiver, *et al.* v. Fourth Nat'l Bank, etc., *et al.*

The errors assigned and not waived call in question each conclusion of law, and the action of the court in overruling appellant's motion for a *venire de novo*.

For convenience, the Indianapolis National Bank will be called Indianapolis Bank, The Éagle Machine Works Company will be called Machine Company, the First National Bank of Knightstown will be called Knightstown Bank, and the Fourth National Bank of New York will be called New York Bank.

The special finding, so far as necessary to the determination of the questions presented is substantially as follows: In 1893 the Indianapolis Bank held three notes on the Machine Company, one for five thousand dollars, one for eleven thousand dollars, and the other for three thousand dollars, which notes were secured by promissory notes, amounting in all to \$19,000.00, taken by the Machine Company in the usual course of business, and deposited by said company with said bank as collateral security for said indebtedness; and it was further agreed that, as such collateral notes became due and payable, said Machine Company was to have the right to withdraw the same from said bank upon depositing as collateral with said bank other unmatured notes of equal amount, to the end that the aggregate amount of such collateral notes should be kept to the amount of such indebtedness, to wit, \$19,000.00.

The Indianapolis Bank and the Knightstown Bank entered into negotiations for the sale to said last named bank of said five thousand dollar note; and in order to avoid the indorsement of said note by said Indianapolis Bank, and reporting the rediscount of the same to the Comptroller of the Currency, the Indianapolis Bank procured the Machine Company to execute a new note for the same amount, bearing the same date, February 1, 1893, and due at the same

Hawkins, Receiver, et al. v. Fourth Nat'l Bank, etc., et al.

time, May 2, 1893, and of the same tenor and effect as the five thousand dollar note held by said Indianapolis Bank, with the exception that said new note was executed by said Machine Company payable to itself and was by it indorsed in blank; that said new note was so executed by the Machine Company to said Indianapolis Bank in lieu of said five thousand dollar note then held by said bank, and was secured by the same collateral notes, amounting to \$19,000.00, as the note for which it was substituted, which was thereupon canceled. The new note so taken was sold and delivered by the Indianapolis Bank to the Knightstown Bank, without indorsement, for which the purchasing bank paid the selling bank \$4,930.00 in cash, which it retained, and has returned no part thereof. And the bank purchasing said note received the same knowing it had been so executed to avoid such indorsement. This note was renewed at maturity by the advice of the Indianapolis Bank.

On May 31, 1893, said Indianapolis Bank sold and indorsed for value received to the New York Bank said note calling for \$11,000.00, which was due and payable July 22, 1893. When said note became due \$7,000.00 thereof was renewed, payable to the Indianapolis Bank, and by it indorsed to the New York Bank. The said Indianapolis Bank failed and closed its doors July 24, 1893. Up to the time of the said failure said Machine Company kept up the aggregate amount of said notes so held as collateral security for said indebtedness of \$19,000.00 to the full sum of \$19,000.00. After the failure of said bank Edward Hawkins was duly appointed receiver thereof, and entered upon the discharge of his duties as such, and took possession of all the assets of said bank including the notes held by said bank at the time of said failure as collateral security for said indebtedness of

Hawkins, Receiver, et al. v. Fourth Nat'l Bank, etc., et al.

\$19,000.00, against the Eagle Machine Company, a part of which had been sold to the Knightstown Bank, and a part to the New York Bank as herein before set forth.

At the time of the failure of the said Indianapolis Bank, it was the owner and holder of notes amounting to \$7,000.00, which, with the note for \$5,000.00, held by the Knightstown Bank, and the note for \$7,000.00, held by the New York Bank, represented the indebtedness of the Machine Company, to secure which said Indianapolis Bank held said collateral notes amounting to \$19,000.00, received from the said Machine Company. At the time of the purchase of said note for \$5,000.00 by said Knightstown Bank from said Indianapolis Bank, and at the time of the renewal thereof, said Knightstown Bank had no knowledge or information that said Indianapolis Bank was not solvent.

Prior to the failure of said bank said Machine Company became indebted to said bank in the further sum of ten thousand dollars, evidenced by a promissory note executed by said company to said bank, which note was wholly unsecured.

The court, among other conclusions of law, found that the Knightstown Bank and the New York Bank each had a lien on the collateral notes and the proceeds thereof in the hands of Edward Hawkins, as receiver of said Indianapolis Bank, and that they were entitled to enforce said liens; that, as between the two banks, the lien of the Knightstown Bank, upon said collateral notes and the proceeds thereof, was superior to the lien of said New York Bank, and that the proceeds of said collateral notes, after paying certain costs and expenses, be applied first to the payment of the amount due the Knightstown Bank, with interest, and next to the amount due the New York Bank, with interest.

Hawkins, Receiver, et al. v. Fourth Nat'l Bank, etc., et al.

It is first insisted by appellants that the Knightstown Bank had no lien upon said collateral notes to secure the note for \$5,000.00 purchased of the Indianapolis Bank, nor any right to receive any of the proceeds thereof; and that the conclusion of law that said bank had such lien, and was entitled to enforce the same, was erroneous.

Upon the facts found the collateral notes in the possession of the Indianapolis Bank were held by it to secure the indebtedness of the Machine Company to said bank, amounting to \$19,000.00, evidenced by three promissory notes, one for \$5,000.00, one for \$11,000.00, and one for \$3,000.00. When the bank sold and delivered the new note for \$5,000.00, executed by the Machine Company in lieu of the note for \$5,000.00 then held by the Indianapolis Bank, to the Knightstown Bank (which new note was so executed by the Machine Company to enable said bank so to sell it), the lien of the indebtedness evidenced by said note passed to said Knightstown Bank. The rule is that the security being the mere incident of the indebtedness, an assignment of the debt passes the title in the pledge to the assignee of the debt, unless the parties agree otherwise. 18 Am. and Eng. Ency. of Law (1st ed.), 663; 2 Am. and Eng. Ency. of Law (2nd ed.), 1084; Jones on Pledges, section 418; 1 Daniel on Negotiable Inst. (4th ed.), sections 748, 834; Colebrooke on Coll. Securities, section 79, p. 107; *Stearns v. Bates*, 46 Conn. 306; *Hormer v. Savings Bank*, 7 Conn. 478; *Esty v. Graham*, 46 N. H. 169. In 2 Am. and Eng. Ency. of Law (2nd ed.), p. 1084, it is said, "For it is a familiar and well settled rule of law that the assignment of a debt carries with it every remedy and security for such debt available by the assignor as incident thereto." In this case, however, the special finding does not show that it was agreed that the title to the

Hawkins, Receiver, *et al.* v. Fourth Nat'l Bank, etc., *et al.*

collateral notes should not pass, but, on the contrary, the facts found show that it was agreed between the parties that said note for \$5,000.00 was secured by said notes held by said Indianapolis Bank as collateral security, and that the same passed to said Knightstown Bank as the purchaser of said note for \$5,000.00. The fact that the Indianapolis Bank did not deliver to the Knightstown Bank the notes held as collateral security, or any part thereof, did not deprive the last named bank of its interest or title to the notes held in pledge by the first named bank, for the reason that said Indianapolis Bank, after said \$5,000.00 note was sold, held said collateral notes as agent or trustee of the Knightstown Bank and itself. Jones on Pledges, section 418, note 4. The renewal of said note for \$5,000.00 at maturity, and making the same payable to the Knightstown Bank, did not affect or change the right of said bank to enforce its lien against said collateral notes. Jones on Pledges, section 541. Colebrooke on Collateral Securities, section 14, section 79 on p. 107; *Dayton National Bank v. Merchants National Bank*, 37 Ohio St. 208, 217; *Holland Trust Co. v. Waddell*, 75 Hun 104, 26 N. Y. Supp. 980.

The rule is stated in Colebrooke on Coll. Securities (1st ed.), p. 107, thus: "The securities pledged for a debt follow it, in equity, no matter how the debt be modified, or into whose hands it may come. Until the debt is paid, the pledge accompanies it, and remains for its repayment, and is available to all who may acquire title thereto."

Nor did the fact that the Machine Company had the right to exchange or substitute other notes as collateral security for said indebtedness for those already held as collateral affect or change such right. Colebrooke on Coll. Sec., section 15.

Hawkins, Receiver, et al. v. Fourth Nat'l Bank, etc., et al.

Under the facts stated in the special finding, the Indianapolis Bank did not repledge the notes held by it as collateral security for said indebtedness of the Machine Company, evidenced by said three notes, for \$5,000.00, \$11,000.00 and \$3,000.00, respectively, nor did it attempt to do so, but said collateral notes remained as security for said indebtedness after \$5,000.00 thereof became the property of the Knightstown Bank, and \$11,000.00 thereof became the property of the New York Bank. Jones on Pledges, section 418; Colebrooke on Coll. Sec., section 79, p. 107; 2 Am. and Eng. Ency. of Law (2nd ed.), 1084. The Indianapolis Bank, at the time of its failure, held said collateral notes as the trustee for itself and the other banks, holders of the remainder of said debt, to secure the payment of which said collateral notes were pledged.

It is insisted by appellants that the finding that the Knightstown Bank received said note for \$5,000.00, knowing that said note had been taken in the manner and form stated in the special finding so that it might be forwarded without being indorsed by the Indianapolis bank shows that a fraud was successfully accomplished.

In this State fraud is a question of fact, and, when essential to a cause of action or a defense thereto, must be found as a fact, and not left to be inferred as a matter of law. *National State Bank v. Vigo County National Bank*, 141 Ind. 352, 357; *Hutchinson v. First National Bank*, 133 Ind. 271, 280, and cases cited. It is not stated in the findings that the Indianapolis Bank sold said note for \$5,000.00 to said Knightstown Bank with any fraudulent intent or for any fraudulent purpose, nor that the said Knightstown Bank had any notice or knowledge of such fraudulent intent or purpose. On the contrary it is stated in the special

Hawkins, Receiver, *et al. v. Fourth Nat'l Bank, etc., et al.*

findings that said Knightstown bank had no knowledge or information when it bought said note that said Indianapolis Bank was insolvent, nor had it any such knowledge or information when said note was renewed, and that it paid \$4,930.00, a valuable consideration, for said note. There is nothing in the special finding that in any manner impeaches the fairness or legality of the transaction between the Knightstown Bank and the Indianapolis Bank, so far as the first named bank is concerned.

It is insisted, that, under the statute of the United States, section 5209, R. S. U. S., the cashier for the Indianapolis Bank had no power to sell said note to the Knightstown Bank unless such authority was conferred upon such cashier by the board of directors of said bank, that the burden of proving such authority was upon the Knightstown Bank, and as the special finding does not state that such authority was conferred by the board of directors upon the cashier, it is equivalent to a finding that such was not conferred by the board of directors of said bank. The board of directors of the Indianapolis Bank had the power to authorize the cashier of said bank to sell said note for \$5,000.00 to the Knightstown Bank, and the facts stated in the special finding show that he did on behalf of said bank so sell said note, and the presumption from said facts is that said sale as made was authorized, or that the same was ratified by the said board of directors until the contrary appears. *National State Bank v. Vigo County National Bank*, 141 Ind. 352, 355, and authorities cited; *Smith, Tr., v. Wells Mfg. Co.*, 148 Ind. 333, 343-344, and authorities cited; *Peoples Bank v. National Bank*, 101 U. S. 181, 183; 17 Am. and Eng. Ency. of Law, 148; 3 Am. and Eng. Ency. of Law (2nd ed.), 843, 844. But even if the special finding stated that said cashier was not au-

Hawkins, Receiver, *et al.* v. Fourth Nat'l Bank, etc., *et al.*

thorized by the board of directors to sell said note on behalf of said bank, as it is found that the said Indianapolis Bank received \$4,930.00 for said note and retained the same and has returned no part thereof, said bank and its receiver are estopped from denying that said cashier was authorized by the board of directors to sell said note, or that the sale was ratified by said board. *People's Bank v. National Bank, supra.*

In said last named case the vice president of a National Bank without any authority from the board of directors, guaranteed the payment of certain notes, the proceeds of which said bank received and retained, and in an action upon said guaranty the Supreme Court of the United States held that said National Bank had the power to give said guaranty, and that it is presumed that the vice president was authorized by the board of directors to execute said guaranty, and that the bank by its retention of the proceeds of the notes, the payment of which was guaranteed, was estopped from denying such authority; that such retention of the proceeds rendered the act of its officers as binding as if it had been expressly authorized. The court, at page 183, said: "We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant [a National Bank] to give the guaranty here in question. It is to be presumed the vice president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. * * * All the parties engaged in the transaction and the privies were agents of the defendant. If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards."

Magee v. Overshiner.

It is next insisted by appellants that the motion for a *venire de novo* should have been sustained because the third finding sets forth the substance of the letters that passed between the two banks in regard to the sale of the note for \$5,000.00, and is a mere recital of the evidence. The third finding states in detail the steps taken by said banks in the sale of said note including the substance of the correspondence between said banks in regard to such sale, and that said note was delivered to the purchasing bank for which it paid \$4,930.00. It clearly appears from the facts stated in said finding that the Indianapolis Bank sold and delivered said note for \$5,000.00 to the Knightstown Bank, for which the last named bank paid the first named bank \$4,930.00, in cash, which the first named bank retained, and has returned no part thereof. Whatever evidentiary facts said finding may contain, they are not sufficient to establish any inferential fact within the issues that is not stated in said finding.

The court did not err, therefore, in overruling the motion for a *venire de novo*, although the special finding may have stated some evidentiary facts. *Boyer v. Robertson*, 144 Ind. 604, 608, and cases cited. Finding no available error in the record the judgment is affirmed.

MAGEE v. OVERSHINER.

[No. 18,158. Filed March 29, 1898.]

TELEPHONE.—Construction Of in Streets.—Rights of Abutting Property Owner.—The reasonable use of the streets of a city for the poles, wires, and necessary equipment of a telephone system is not a new and additional servitude for which the abutting property owner is entitled to compensation. *p. 140.*

SAME.—Ownership by Individual.—An individual may own and operate a telephone system without legislative consent, where there is no legislative restriction upon such right. *p. 141.*

From the Howard Circuit Court. *Affirmed.*

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158	95
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163	220
150	127
169	586
169	605

Magee v. Overshiner.

G. W. Funk, D. H. Chase and Blackledge & Shirley,
for appellant.

S. T. McConnell, A. G. Jenkins, M. Bell, W. C. Purdum, E. B. Goodykoonts, and G. M. Ballard, for appellee.

HACKNEY, J.—Rufus Magee, the owner of a business property fronting upon one of the principal business streets of the city of Logansport and the owner of the fee in the street, brought this suit for a mandatory injunction to cause the removal of a telephone pole placed by the appellee, Overshiner, in the curb-line of the sidewalk in front of said property. The appellee, the owner of the telephone system in said city, placed said pole and strung wires upon the same in the night time, after protest by the appellant, and without compensation to or consent from him.

The principal question in the case is as to whether such use of the street is a servitude not within the contemplated uses of a city street, and, therefore, an additional burden upon the fee of the appellant for which he should be compensated.

The decisions of the courts of this country, so far from establishing a definite rule upon this question, are at such variance as to render hopeless any effort to reconcile them.

At the threshold of our inquiries there are certain well recognized propositions: The owner of the fee in a street which has been dedicated or condemned for a street is entitled to restrict its uses to such as are proper street uses, as stated by most of the decisions, to the uses contemplated at the dedication or condemnation; the public have only an easement for the proper uses of a street. When applied to new uses the fee-owner is entitled to compensation. When a use is by proper public authority, and is not an additional burden upon the fee, no compensation is due the fee-

Magee v. Overshiner.

owner. In the use of the public easement there is no right to unreasonably burden the fee to the special injury and damage of the fee-owner.

These general propositions, however, are of little service when we revert to the question: Is the telephone equipment an unnecessary or unreasonable obstruction and a new and additional servitude? Will it suffice to say that because a street was dedicated or condemned fifty years ago, before electric inventions for lighting, communicating oral and telegraphic messages, and propelling street cars were thought of, it could not, therefore, have been condemned or dedicated in contemplation of the uses therein of such inventions; or that because gas had not been used as a method of lighting, the right to lay pipes to conduct the gas could not have been contemplated; or that because water, for protection against fire, had not been forced through pipes in the streets, such use could not have been contemplated, and so on as to the uses of the street for sewerage, for natural gas piping, for telegraph or telephone lines, above or below the surface of the street, or for the possible future uses of pneumatic tubes for the transmission of mail or parcels, and the distribution of steam or electricity for heating, etc.? If what was actually contemplated at the time of the dedication should be found to answer the question in every case, many of the uses common to the streets of every city would be additional servitude for which the fee-owner would be entitled to compensation.

It must be, however, that the contemplated uses should be deemed to have been not only in the walking, riding upon horseback and in wagons or other vehicles drawn by animals, in the going and returning upon business, social, religious or political missions,

Magee v. Overshiner.

but also by such methods of travel and communication, in addition or in substitution for those, as might come into vogue and be accepted and recognized as proper and important uses of the streets in the varying needs and demands of commerce, and the relations of man to man socially and otherwise. If this were not true, the way originally dedicated for a suburban highway, but by the growth of population becoming a city street, or the dedication of a village or town street afterwards becoming the principal thoroughfare of a great city, would be limited to the uses in vogue at the time and suited to the country road or the village or town street, and the growth of population, the advancement of commerce, and the increase in inventions for the aid of mankind would be required to adjust themselves to the conditions existing at the time of the dedication, and with reference to the uses then actually contemplated. That a dedication or condemnation is deemed to comprehend uses not actually in the minds of the parties at the time is seen from the almost unvarying rule that the electric street railway systems are not a new use and an additional servitude, but are a new method of enjoying an old and ever-existing use. *Fichels v. Evansville Street R. W. Co.*, 78 Ind. 261; *Chicago, etc., R. W. Co. v. Whiting, etc., R. W. Co.*, 139 Ind. 297; *Lockhart v. Craig Street R. W. Co.*, 139 Penn. 419, 21 Atl. 26; *Detroit City R. W. Co. v. Mills*, 85 Mich. 434, 48 N. W. 1007. They carry the people by means of a propulsive force which is a substitute for the horse or mule which formerly drew the cars. The horse car was accepted as a conveyance added to the numerous kinds of vehicles in use, and varying in the use of stationary tracks or railways.

Poles and wires for electric lighting have been admitted as a proper use on the ground that the

Magee v. Overshiner.

streets are lighted and their general uses thereby made safer and more expeditious. Incidentally, the same use has been employed for supplying light to public, business, and private houses. Sewers have been admitted as not constituting an additional servitude because they afforded a means of drainage for the streets, although one use was in carrying the waste from buildings of the citizens. Gas mains and poles were admitted in like manner as electric lighting systems and for like uses.

In none of these cases has the inquiry been as to whether the fee-owner contemplated such uses, or whether they were in vogue at the time of the dedication. They were always deemed to constitute a beneficial use of the streets as in some degree aiding in the means or opportunities for conducting the affairs of the inhabitants, and in facilitating the communication indispensable to such affairs.

Some of the authorities, reaching the same conclusion, treat the uses of a street, arising from a dedication or condemnation, as expansive, not confined to uses already permitted, but, as civilization advances, admitting new uses. Angell and Ames Corp., section 312; *Julia Building Ass'n v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398; *Cater v. Northwestern, etc., Co.*, 60 Minn. 539, 63 N. W. 111; *Detroit City R. W. Co. v. Mills*, *supra*.

In *Cater v. Northwestern, etc., Co.*, *supra*, it is said: "The question, then, is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it in-

Magee v. Overshiner.

cluded the idea of a way for pack animals, * * constituting, respectively, the '*iter*,' the '*actus*' and the '*via*' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use."

Judge Elliott, in his work on Roads and Streets, p. 529, quotes approvingly from Cooley's Con. Lim., 556, as follows: "When land is taken or dedicated for a town street, it is unquestionably appropriated for all ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run on a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving."

Upon this branch of our inquiries we must conclude, therefore, upon both reason and authority, that the uses of streets prevailing at the time of the taking

Magee v. Overshiner.

or dedication of a street are not the limits of the uses to which the public is entitled, and which the soil-owner is deemed to have contemplated, but that such uses are to be enlarged to include all of the additional and improved methods of attaining the same objects and enjoying the same privileges, not, however, to the denial or substantial impairment of the fee-owner's use and enjoyment of his abutting property.

Is the telephone, with its necessary poles and wires, to be regarded as a new use, so disconnected from the purposes and objects in actual and legal contemplation when our city streets were dedicated or condemned; as to constitute an additional servitude?

The telegraph equipment, in its occupancy of the highway or street, and its uses is the nearest parallel we have to that of the telephone system. They are both inventions for communication by electricity. The equipment occupying the streets is the same. Some authorities have attempted to distinguish between the uses contemplated of city streets and of suburban highways. This distinction was recognized by this court in *Kincaid v. Indianapolis, etc., Co.*, 124 Ind. 577, where this language was employed: "There is an essential distinction between urban and suburban highways, and the rights of the abutters are much more limited in the case of urban streets than they are in the case of suburban ways. We note the distinction between the classes of public ways, and declare that the servitude in the one class is much broader than it is in the other."

In Elliott's *Roads and Streets*, p. 299, it is said: "There is an essential difference between urban and suburban servitudes. The owner of the dominant estate in an urban servitude has very much more authority, and much greater rights than the owner of the

Magee v. Overshiner.

dominant estate in a suburban servitude. The easement of the one is very much more comprehensive than that of the other. It is doubtful whether, of all the servitudes, there is one so broad and comprehensive as that of a city in its streets." Again, the same author says, on p. 307, "The easement in a city is so broad and exclusive as to leave very little, if any, private right of use in the owner of the servient estate."

If this doctrine is accepted, and we think it must be, the cases which hold that telegraph and telephone lines upon country highways are an additional servitude cannot be given much weight in determining the question before us. However, those cases which hold that these uses of the suburban ways are not an additional servitude, if their reasoning is tenable, apply to the cases of city streets with greater force than to those of country ways.

Cater v. Northwestern, etc., Co., supra, is such a case. In addition to the pertinent quotation already made from that case, we quote the following: "We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. We are not forgetful of the fact that care should be taken that, in the popular zeal for modern public improvements, the burden of furnishing these improvements should not be shifted from the public, and imposed upon any particular class of individuals. But viewing, as we do, highways as being designed as public avenues of travel, traffic, and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed,

and, within the limitations which we have suggested, does not impose an additional servitude upon the land; in short, that it is merely a newly-discovered method of using the old public easement."

Another case of the same character is that of *People v. Eaton*, 100 Mich. 208, 59 N. W. 145. It was there said: "When these lands were taken or granted for public highways, they were not taken or granted for such uses only as might then be expected to be made of them, by the common method of travel then known, or for the transmission of intelligence by the only methods then in use, but for such methods as the improvement of the country, or the discoveries of future times, might demand. * * * It would be a great calamity to the State if, in the development of the means of rapid travel, and the transmission of intelligence by telegraph or telephone communication, parties engaged in such enterprises were compelled to take condemnation proceedings before a single track could be laid or a pole set." This latter proposition can be better appreciated by the supposition that in the city of Indianapolis a telephone company should be required to make legal condemnations as to the twenty thousand or more properties fronting upon the streets of that city.

The cases of *Pierce v. Drew*, 136 Mass. 75; *York Telephone Co. v. Keesey*, 5 Penn. Dis. Rep. 366 and *Julia Building Ass'n v. Bell Tel. Co.*, *supra*, are directly in point in holding that the erection of telephone systems upon city streets is not an additional servitude for which the adjacent fee-owner is entitled to damages, but that such use, being an improved method of transmitting intelligence, and a substitute for the messenger upon foot, on horseback, or by vehicle, is within the contemplated uses at the time of the dedication.

Magee v. Overshiner.

In the last case cited, it was said: "These streets are required by the public to promote trade and facilitate communications in the daily transactions of business between the citizens of one part of the city and those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point he is entitled to use the street, either on foot, on horseback, or in a carriage, or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen and carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman or carriage."

In the case of *Pierce v. Drew, supra*, a like reasoning is adopted. It is there said: "The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar

Magee v. Overahiner.

to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out."

In *Hershfield v. Rocky Mountain, etc., Co.*, 12 Mont. 102, 29 Pac. 883, it was held that the telephone equipment was not a new and additional burden upon the fee in a city street, quoting with approval from *Julia Building Ass'n v. Bell Tel. Co.*, *supra*. It is true that it was further held that the fee in the street was not in the abutting owner, but the proposition is distinctly adopted that it is germane to the proper use of streets to allow the setting of poles and wires for the telephone.

In *McCormick v. District of Columbia*, 4 Mackey 396, 54 Am. Rep. 284, the right of the telephone system to occupy the streets as a proper street use was held. The same right was recognized in *Irwin v. Great Southern Tel. Co.*, 37 La. Ann. 63, but it was placed upon the rule that the abutting owner could not complain since the fee in the streets was in the public.

We observe no means of distinguishing against the telephone equipment, on the ground that its poles are not in motion as are ordinary instruments of travel, since the permanent occupancy by the trolley poles, the gas and water pipes, etc., is maintained. See *People v. Eaton*, *supra*; *York Telephone Co. v. Keesey*, *supra*.

If the existence of private benefit to the fee-owner were the turning point between the admission of those things not instruments of travel or movement, as the fire cistern, the illuminating and heating gases, the

Magee v. Overshiner.

water pipes, sewers, etc., and the telephone, it would be exceedingly difficult to establish the absence of private benefit to the property owner and business man in the employment of the telephone.

Opposed to the view of the question as we have presented it are cited several authorities. *Stowers v. Postal Telegraph Cable Co.*, 68 Miss. 559, 9 South. 356, involved the right to place telegraph poles upon the sidewalk in the city of Vicksburg. The controlling portion of the opinion is as follows: "There is some conflict in the authorities, but the decided weight is to the effect that telegraph companies form no part of the equipment of a public street, but are foreign to its use, and that where the abutting owner is the owner of the fee to the center of the street he is entitled to additional compensation for the additional burden placed upon his land. Lewis on Eminent Domain, section 131, citing *Tel. Co. v. Barnett*, 107 Ills. 507; *Dusenbury v. Tel. Co.*, 11 Abb. Cases 440; *Tel. Co. v. Lead Co.*, 50 N. Y. Supr. Ct. 488; *Broome v. Telegraph Co.*, 42 N. J. Eq. 141; *contra*, *Hewitt v. Tel. Co.*, 4 Mackey 424; *Pierce v. Drew*, 136 Mass. 75; *Building Ass'n v. Tel. Co.*, 88 Mo. 258." All of the cases cited by the court as in conflict with its opinion have been cited by us. Those cited in support of the opinion are by reference to Lewis on Eminent Domain, where the text is supported by the four cases first named by the court. Of those cases, *Tel. Co. v. Barnett*, *supra*, involved the location of a telegraph pole in a rural highway, as did also *Dusenbury v. Tel. Co.*, *supra*. In *Broome v. Tel. Co.*, *supra*, the statute authorizing the establishment of a system required that the consent, in writing, of the property owner should be procured for the purpose and without such consent the right was denied. The one case cited in the *Stowers* case giving it any support was *Tel. Co. v. Lead Co.*, *supra*.

Magee v. Overshiner.

That case broadly asserts that the telegraph service is not a street use. That conclusion is at variance with our conclusion.

Among the other cases cited by counsel for the appellant are *Eels v. American Tel., etc., Co.*, 143 N. Y. 133, 10 Am. R. R. and Corp. Rep. 69, 38 N. E. 202; *Western, etc., Co. v. Williams*, 86 Va. 696, 11 S. E. 106; *Pacific Cable Co. v. Irvine*, 49 Fed. 113, in each of which the question was as to the erection of telegraph poles upon a rural highway and, if the distinction heretofore maintained is correct, are not authorities in this case.

In *Willis v. Erie, etc., Co.*, 37 Minn. 347, 34 N. W. 337, the judgment of the trial court, holding the telephone pole upon the city street an additional servitude, was affirmed, upon a division of the court, and for the lack of a majority for either side of the question. It is therefore of little force as an authority.

The only other decision, thought to be analogous, to which we have been cited, or which our extended researches have discovered, is that of *Chesapeake, etc., Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690. In that case the complaint was held sufficient upon the general allegation that the pole planted in the footway in front of the plaintiff's warehouse "obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of said premises" without permission and without payment of compensation. It was held to present a cause of action for a direct interference with the use of the warehouse, and the question of the use of a street or a highway as an additional servitude was expressly held not to be involved. It was held also that the legislature had not and could not authorize the substantial impairment of such beneficial enjoyment of one's property. We do not, therefore, regard that case as in point. Nor do we regard

Magee v. Overshiner.

the New York elevated steam railway cases as in point. Those cases correctly held, as we think, that the use of the street for such railway was an obstruction of the easements of access, light and air, if not an unanticipated street use.

Text writers, justly renowned, have grouped many of the cases cited by us, and have variously expressed the opinion that the weight of authority forbids the use of an urban way for telephone equipment. We have found, however, no analysis of the cases, and no attempt by such writers to classify the cases applying to urban and suburban ways and no effort has been made by them to consider the reasons supporting the cases which uphold the use as within the scope of proper street uses.

As we have seen, there are but two decisions of authoritative force supporting the contention of the appellant. Those decisions involved the use of the telegraph equipment, a use, as we have said, more nearly like that of the telephone than any other. The telegraph, however, has never been employed as a means of interurban communication. It requires skilled persons to receive the messages, and then they are to be carried to the persons for whom they are intended by just such means and uses of the streets as would other written communications. The telephone is particularly useful in communications between the people within a city, and it can be used for that purpose directly, and by persons without special skill. It is more clearly a substitute for the old methods of the communication of messages between persons within the city than the telegraph.

We conclude that the reasonable use of the streets of a city for the equipment of a telephone system is not a new and additional servitude for which the abutting property owner is entitled to compensation.

Coburn *et al.* v. Sands *et al.*

Nor do we agree that the ordinary pole and wires are necessarily a special injury to the enjoyment of the abutting property.

Nor do we agree with the appellant that a telephone system may not be owned and conducted by an individual because of the grant, by the legislature, of such rights to corporations. An individual may conduct any proper business without legislative assent, unless there has been some legislative restrictions upon such right.

If, in the present case, the appellant had been entitled to restrain the use because an additional servitude, the appellee could not have taken the use without an agreement with the appellant or some legislative power to condemn. That question is put at rest by the holding that there is no additional servitude in the erection of the pole. The judgment of the lower court is affirmed.

COBURN ET AL. V. SANDS ET AL.

[No. 18,433. Filed Dec. 16, 1897. Rehearing denied March 29, 1898.]

APPEAL.—*When Erroneous Conclusion of Law is Harmless.*—Where one of three conclusions of law in a case is incorrect, the error is harmless if the other two conclusions are correct, and fully justify the judgment of the trial court. pp. 145, 146.

RAILROADS.—*Condemnation of Land.*—*Lien for Damages Awarded.*—*Mortgage.*—A claim for the payment of land condemned by a railroad company is superior to any lien afterwards placed upon said land whether by operation of a previous or subsequent mortgage. p. 146.

SAME.—*Condemnation of Real Estate.*—*Abandonment of Interest in Condemned Realty.*—In accordance with section 5160, Burns' R. S. 1894, a railroad company, in the year 1880, condemned and appropriated a strip of land adjoining its right of way. The damages awarded were never paid, and no demand therefor was made till 1889. The company did not take formal possession of said land till 1887, and then, within a few days, suffered itself to be dispossessed by another railroad company. To the latter company, the original owners of the land, for a valuable consideration, executed a warranty

Coburn et al. v. Sands et al.

deed. *Held*, that the acts, both of the original owners of the land, and the railroad company to which the land was first awarded, amounted to an abandonment of all claims under the condemnation proceedings. *pp.* 147, 148.

From the Marion Superior Court. *Affirmed.*

John Coburn and Daniel Wait Howe, for appellants.

Augustus L. Mason, for appellees.

HOWARD, C. J.—This was an action to declare and enforce a lien in favor of appellants upon funds in the hands of appellees, as trustees, proceeds of the sale of what is now known as the Indianapolis, Decatur & Western Railway.

From the special finding of facts by the court, it appears: That on August 6, 1880, the Indianapolis, Decatur and Springfield Railway Company filed in the office of the clerk of the court below, an instrument of appropriation of a certain strip of land owned by appellants, located in Louisiana street, in the city of Indianapolis, to be used for a permanent right of way for the construction and maintenance of the road of said company. On December 17, 1880, the appraisers appointed by the court made return of their award, assessing the value of the property so taken at nothing, and appraising the damages for injury to appellants' lands not taken at \$1,500. This award was never reversed, and was never paid or tendered, and remains wholly unsatisfied. On the night of June 11, 1887, Henry B. Hammond, then receiver of said railway company, caused his employes to enter upon the premises so appropriated and construct thereon a piece of track, but he did not succeed in connecting such track with other tracks of the road, nor was any use made of the same for the passage of trains. Soon after, the Indianapolis Union Railway Company entered upon said property and forcibly took up and removed said track, and no further attempt was made

by said receiver or any one else in behalf of said first named railroad company to take possession of or use said property so appropriated, nor has said property ever at any time since been used by said Indianapolis, Decatur and Springfield Railway Company or by any officer or corporation succeeding to or representing said company.

It further appears from the finding, that on December 31, 1875, the Indianapolis, Decatur and Springfield Railway Company executed its mortgage to certain trustees named, pledging all the property then owned or thereafter to be acquired by the company, in security for bonds then issued. On April 28, 1876, the company executed a second mortgage on the same property. On March 16, 1885, in a suit to foreclose the second mortgage, the said Henry B. Hammond was appointed receiver of the company, and, in accordance with judgments duly entered in February, 1887, the property was sold, subject to the first mortgage; and thereupon the purchasers organized the Indianapolis, Decatur and Western Railway Company, which took possession of all the property, rights and franchises of the original company. On July 23, 1889, default having been made in the payment of interest due on the first mortgage bonds, the appellees, as trustees under said first mortgage, took possession of the property of said railway companies, entered upon the management of the same, and brought their action in the court below to foreclose said mortgage. In the action so brought, the appellants filed their intervening petition, answer, and cross-complaint, setting up the facts as to the appropriation of their said strip of land, and asking that the lien of their assessment therefor be held prior and superior to the lien of said mortgage, and that, in case of foreclosure, the court order their claim first paid out of the proceeds of sale.

Coburn et al. v. Sands et al.

In the decree of foreclosure, entered June 23, 1891, it was adjudged that the lien of said first mortgage was paramount and superior to the claim, right, or interest of all the defendants, to said action, except the claim of these appellants; as to which latter it was ordered that the intervening petitioners might thereafter establish their claim against the fund arising from the sale, or against the plaintiffs in that action, here the appellees; and it was further ordered, that said interveners were to be in no manner precluded from enforcing to their full extent the claims set forth by them in their petition, the consideration of which, by consent of parties, was reserved for some future date to be fixed by the court; and it was in said decree expressly provided that should said Coburn and others, the appellants, be found equitably entitled to any recovery, the same should be transferred to and become a charge upon the fund arising from the proceeds of the sale of said railroad property, or upon any funds in the trustees' hands, arising from the operation and management thereof, "the intent being that the said premises and property be sold free and clear from any claim of the said Henry Coburn and his said co-claimants." The proceeds of the sale made under said decree amounted to less than the amount due upon the said first mortgage bonds, the deficiency being about \$200,000.

It is further found that upon the filing of appellants' intervening petition, and before the trial and finding, appellees, on behalf of the first mortgage bondholders, disclaimed any interest in the property described in the instrument of appropriation; and also, that neither they, as trustees, nor the Indianapolis, Decatur and Western Railway Company, to which, in May, 1894, they surrendered possession of the property of which they had been trustees, ever

took possession of, or used, or made any claim to the land so appropriated. It is also found, that at no time after the making of the award in said condemnation proceedings, in 1880, and until the filing of the intervening petition in this case, in 1889, did appellants, or either or any of them, ever apply to the court to order payment, or make any other effort to enforce payment, of said award. That, in the mean time, in the year 1886, the Indianapolis Union Railway Company instituted its condemnation proceedings for the appropriation of all of appellants' property along Louisiana street, including the strip of land hereinbefore described, and the award made to appellants in said proceedings was confirmed on appeal to the court below; and it was by reason of such condemnation proceedings that said Union Railway Company claimed the right to oust Hammond, receiver, in 1887, and take possession of said strip of land, as hereinbefore set out. That in September, 1887, appellants, by warranty deed, conveyed to the said Indianapolis Union Railway Company their entire property along Louisiana street, including the strip of ground here in dispute; and no reservation or exception from said warranty was made in said deed as to any right of way over any of said ground. The consideration for said conveyance and warranty of the entire property, including the part here in dispute, was \$32,000.00.

The first conclusion of law was, that the equities of the case were with the appellees, and against the appellants; and the third conclusion was, that the intervening petitioners were not entitled to be paid out of the proceeds of the sale of the railroad or out of the fund derived from the operation of the road. These conclusions were undoubtedly correct, and fully justified the judgment in favor of appellees.

Coburn et al. v. Sands et al.

The second conclusion of law, that the lien of the first mortgage was superior in equity to the claim of appellants, while unauthorized, as we think, was yet harmless, by reason of the first and third conclusions.

If appellants had any rightful claim at all, it was a claim for payment for land taken from them by the act of appropriation; and such claim would be superior to any lien afterward placed upon said land by the railroad company, whether by operation of previous or of subsequent mortgage. *Buffalo, etc., R. R. Co. v. Harvey*, 107 Penn. 319; *Lewis Em. Dom.*, section 621; *Jones Corp. Bonds and Mort.* (2nd ed.), section 118. A railroad company or other corporation cannot appropriate land without paying for it. As said in *Midland R. W. Co. v. Galey*, 141 Ind. 483, citing also *Chicago, etc., R. W. Co. v. Hall*, 135 Ind. 91, "A man's land cannot be taken from him without compensation. The new railroad company which succeeds to the rights and privileges of the old company cannot divest itself of the burdens. * * * 'The new company is enjoying the easement, under the conditions of the old company, and the benefits and burdens incident to its use are inseparable.'"

In *Chicago, etc., R. W. Co. v. Hall*, *supra*, this comprehensive statement was taken from *Lake Erie, etc., R. W. Co. v. Griffin*, 107 Ind. 464: "The appellant's liability does not rest upon the judgment against the old corporation, but upon the principle that, of having adopted and ratified the original appropriation, it is bound in equity and good conscience, to make compensation. For the right of the appellees to compensation for their property is protected by the Constitution, and it will not do to say that their unsatisfied judgment against the old insolvent corporation affords them any just compensation." See, further,

Coburn et al. v. Sands et al.

Chicago, etc., R. W. Co. v. Galey, 141 Ind. 360, and *New York, etc., R. R. Co. v. Hammond*, 132 Ind. 475.

If therefore appellants had any lien at all under their claim, such lien would be superior to that of any mortgage afterwards placed upon the same property. It would be, in effect, a lien for purchase money, evidenced by a public record in the court in which the appropriation proceedings were had, and could not be defeated by a subsequently attaching mortgage.

Under the statute, section 5160, Burns' R. S. 1894 (3907, R. S. 1881), as soon as the appropriation had been made by the act of the railroad company and possession taken, the rights of both parties would at once vest. The company would become the owner and entitled to the possession of its easement in the land, and the other party to the award, subject to a right of appeal by either party, to change the amount of the award. The landowner could no longer lay claim to the land as against the company, and the company could only contest the amount of the award. Their rights were reciprocal.

The parties could, however, mutually waive their rights; and either might estop itself from claiming under the act of appropriation. It is found by the court that appellants never made any demand for the money awarded them, from the time of the award, in 1880, until the filing of the intervening petition, in 1889. The railroad authorities, also, made no effort to take possession of the property from the time of the award, in 1880, until the night of June 11, 1887; and, a few days after this, they suffered the Indianapolis Union Railway Company to dispossess them, and never afterwards seem to have laid any claim to the land; and on the bringing of the intervening petition they filed their formal disclaimer of any interest in it. This would seem to have amounted, practically, to a

Powell *et al.* v. City of Greensburg.

mutual abandonment of all claims by either party under the condemnation proceedings.

But, more than this, the appellants, in 1887, long before the filing of the intervening petition, made a warranty deed of the premises to the Indianapolis Union Railway Company, which company had, moreover, already acquired possession of the land, by condemnation and by the apparent acquiescence of the railroad authorities. The land which the appellants thus sold to the Union Railway Company is the same land for which they are now seeking compensation from appellees. They cannot both eat their cake and have it. We think, as the court concluded, that the equities of the case are with the appellees.

What we have said covers sufficiently, as we think, also the questions raised as to the overruling of the motion for a new trial. Judgment affirmed.

POWELL ET AL. v. CITY OF GREENSBURG.

[No. 18,417. Filed March 29, 1898.]

MUNICIPAL CORPORATIONS.—*Proceedings to Open and Extend Street.*
—Jurisdiction.—Appeal to Circuit Court.—Statute Construed.—By proceedings, under section 3631, Burns' R. S. 1894, a city ordered the opening and extension of a certain street. An appeal to the circuit court was taken by property owners in accordance with the provisions of section 3643, Burns' R. S. 1894; and the property owners desiring to question the jurisdiction of the common council and the city commissioners to open the street, demurred to the complaint "on the ground that the court had no jurisdiction." *Held*, that, as the want of jurisdiction was not apparent on the face of the complaint (the transcript), the demurrer was properly overruled. *pp. 149, 150.*

SAME.—*Annexation of Contiguous Territory.—Notice of Petition.*—A notice of the petition of a common council to annex contiguous territory, under section 3659, Burns' R. S. 1894, need not give the names of the owners of the land in addition to the description thereof, and where incorrect names of the landowners are included in the notice, they will be rejected as surplusage without impairing the sufficiency or validity of the notice. *pp. 152, 153.*

150 149
153 152

Powell *et al.* v. City of Greensburg.

MUNICIPAL CORPORATIONS.—*Condemnation of Railroad Right of Way for Street.*—Land used by a railroad company for the use of its road may be appropriated by a city for street purposes. p. 154.

SAME.—*Proceedings to Open and Extend Street.*—*Appeal to Circuit Court.*—*Defense.*—On appeal to circuit court from an order of the common council of a city to open and extend a street, an objection that the city commissioners omitted to include and assess in their report property belonging to persons other than appellants will not be considered. p. 154.

From the Decatur Circuit Court. *Affirmed.*

B. F. Bennett, T. E. Davidson, Cortez Ewing and Davison Wilson, for appellants.

David A. Myers, for appellee.

JORDAN, J.—This was a proceeding by the common council of the city of Greensburg to open and extend Wilder street, under the provisions of sections 3631, Burns' R. S. 1894 (3168, R. S. 1881).

Appellants appealed to the circuit court, under section 3643, Burns' R. S. 1894 (3180, R. S. 1881), in which court they demurred to the complaint on the ground that the court had not jurisdiction to try the cause. This demurrer was overruled, and this ruling is assigned as error.

By section 3643 (3180), *supra*, appellants in the lower court were required to specifically state in writing their objections, if any, to the proceedings of the common council and commissioners. It is therein provided that no other questions shall be tried or heard, except such as are with a certainty to a common intent presented by the appellant in his written statement. It was the purpose, no doubt, of appellants by this demurrer to question the jurisdiction of the common council and city commissioners in the proceedings to open the street in controversy, consequently, if the want of jurisdiction was apparent on the face of the transcript, they should, in their demurrer, have stated specifically wherein it existed; and if such

Powell et al. v. City of Greensburg.

questions depended upon facts not apparent upon the record of the proceedings filed in the lower court, such facts should have been specifically set up by way of answer. The demurrer did not sufficiently point out the grounds of objection within the requirements of the statute, and was therefore properly overruled. *Hays v. City of Vincennes*, 82 Ind. 178.

Appellants filed an answer which apparently proceeds upon the theory that their lands, which the appellee sought by this proceeding to appropriate for a public street, were not within the city limits, and therefore not subject to the jurisdiction of appellee. The answer, after describing the real estate to be appropriated for the street in dispute, avers "that none of said real estate in this answer described was ever taken into the corporate limits of said city, for that on January 2, 1896, said city petitioned the board of commissioners of said county to annex certain lands contiguous to the corporate limits of the city, including the land herein described, setting forth in said petition that the territory sought to be annexed was that owned by one Tilford Dickerson." The answer then alleges that the land was not owned by said Dickerson at the time of said annexation proceedings, but was owned by the appellant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and by Henry Doles, and that thereafter the part owned by Doles was by him conveyed to appellants Israel D. and Samantha Jewett. It is then further averred that on January 4, 1896, a notice of said petition to annex said territory was given by the common council of the city of Greensburg, thirty days before the beginning of the March term, 1896, of the board of commissioners of the county, by publication in the "Greensburg Review," a public newspaper of general circulation, published and printed in said county.

That this was the only notice given, and that it contained a description of the lands sought to be annexed "including the lands herein described." That in this notice the land therein described was designated as being owned by one Tilford Dickerson. That at said March term of said commissioners court such proceedings were had that the prayer of the petition was granted, and the lands were declared to be annexed to the city, and the limits thereof were ordered extended so as to include the lands described and set forth in the notice. It is further alleged in the answer that the map and plat of the territory to be annexed by said proceeding described the land as belonging to Tilford Dickerson, and that the names of the owners of the land described in the petition and notice were not set forth therein; and it is then averred, as a conclusion, that the appellants in fact never had any notice of the proceedings of said annexation. The answer also sets up that part of the real estate involved herein belongs to the right of way of the appellant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and that certain other real estate abutting on said proposed street and belonging to persons other than appellants, was omitted by the said commissioners in their report, and that no assessment was made thereon, either of benefits or damages. The answer demands judgment for costs in favor of all the appellants. A demurrer was sustained to this answer for insufficiency of facts, and this ruling is also assigned as error.

Counsel for the appellants insist that the answer was sufficient, (1) For the reason that it discloses that the appellee has no jurisdiction over the real estate to be appropriated for the use of the streets; (2) For the reason that it shows that part of the real estate is embraced in the right of way used by

Powell et al. v. City of Greensburg.

the railway company; (3) Because the answer alleged that certain other pieces of real estate abutting on the proposed extension of Wilder street were omitted from the report of the commissioners and not assessed.

Appellants, by this answer, in part, make a collateral attack on the order of the board of commissioners annexing to the city the real estate in controversy in the proceedings in this case. The infirmity which the pleading attributes to the notice given of the proposed annexation of this territory, is, that it stated that the land described therein belonged to Tilford Dickerson, when in fact no part thereof was owned by him, but the same was owned and held in part by the railway company, and in part by one Henry Doles, from whom appellants Jewett and Jewett subsequently acquired their title. There is no contention that the real estate herein involved, and which was ordered to be annexed in the proceedings before the board of commissioners, was not accurately described in the petition, and also in the notice given that such proceedings were to be instituted by the city to annex said territory and thereby extend its jurisdiction over the same. In fact, the answer avers that the notice in question contained a description of land sought to be annexed, including the lands described in the answer, and which are affected by the opening or extension of the street in question.

The statute which authorizes the common council of a city to petition the board of commissioners to annex to the city unplatted contiguous territory, to the annexation of which the owner thereof will not consent, requires such council to give "thirty days' notice, by publication in some newspaper of the city, of the intended petition, describing in said notice the territory sought to be annexed." Section 3659, Burns' R. S. 1894 (3196, R. S. 1881).

The law did not require that the notice should give the names of the owners of the land in addition to the description thereof, and the fact that such notice, through mistake or inadvertence, or otherwise, states that a certain person therein named is the owner of the land or territory sought to be annexed, will not vitiate or invalidate it, nor render it deficient or illegal. The notice in question, as disclosed by the averments of the answer, and also by a copy thereof, which appellants file as an exhibit in aid of their pleading, described the territory intended to be annexed by metes and bounds, and an examination thereof would certainly have afforded appellants information, and advised them that their lands were included in the territory which the city was seeking to annex, notwithstanding the fact that the notice erroneously stated that the same was owned by Dickerson. As the statute did not require the name of any landowner to be stated in the notice, the name of the latter, whether he was the owner of the land or not, could be rejected as surplusage without impairing the sufficiency or validity of the notice. *Woodfill v. Town of Greensburgh*, 18 Ind. 203; *Stilz v. City of Indianapolis*, 55 Ind. 515; *Catterlin v. City of Frankfort*, 87 Ind. 45.

It is, however, in this case, sufficient answer to the insistence of appellants in regard to the question herein raised relative to said notice, to say that it appears that the annexation proceedings were in a matter over which the board of commissioners was invested under the law with original and exclusive jurisdiction, and that a notice in regard to the proceeding to annex the territory, provided by the statute, was given thirty days previous to the March session, 1896, of the board of commissioners, at which session the order annexing the territory was made, and that said board apparently adjudged said notice

 Sutherlin v. The State.

sufficient by granting the prayer of the petition, and that its sufficiency is now for the first time called in question by this collateral attack upon the order or judgment of the board in said annexation proceedings.

Upon any view of the case, under the circumstances, as against such an assault, the notice must be held sufficient; and if it can be said to be open to the irregularities or objections charged against it by counsel for appellants, these could have been available only by being interposed in the proceedings to annex the said territory. *City of Terre Haute v. Beach*, 96 Ind. 143, and cases there cited; *Huff v. City of Lafayette*, 108 Ind. 14, and cases there cited; *Casky v. City of Greensburgh*, 78 Ind. 233.

Appellants' second proposition or claim, to the effect that land used by the railroad company for the use of its road cannot be appropriated by the city for street purposes, is decided adversely to their contention in the case of *City of Terre Haute v. Evansville, etc., R. R. Co.*, 149 Ind. 174.

In answer to the third proposition, in regard to the commissioners omitting to include and assess in their report property belonging to persons other than appellants, it may be said that these are matters which do not affect the latter, and of which, under the provisions of section 3643, they cannot be heard to complain.

There is no error in the record and the judgment is therefore affirmed.

 SUTHERLIN v. THE STATE.

[No. 18,497. Filed March 30, 1898.]

COURTS.—*Continuance Beyond Term.*—Where a criminal trial is in progress on the last day of a term of court, the judge has the power to continue the term until the trial is completed, and to fix

Sutherlin v. The State.

a day when the cause is to be renewed; and the fact that the day to which the cause was adjourned was a day when the circuit court of another county in the same judicial circuit would or could be in session, would not render such continuance invalid. *pp. 155-157.*

RAPE.—Evidence.—In a prosecution for rape the evidence of the prosecuting witness was that she was 17 years of age; that she was attacked at a lonely place in the highway, and after release by her assailant she sought protection in the nearest residence, and complained to her mother immediately upon returning home; that she at once made affidavit for the arrest of defendant and his brother. Her evidence was in part corroborated by her parents, the physician, the officers, and by the admissions of appellant's brother. *Held*, that the evidence was sufficient to support a conviction. *p. 158.*

From the Starke Circuit Court. *Affirmed.*

Burson & Burson and A. L. Courtwright, for appellant.

W. A. Ketcham, Attorney-General, Frank J. Vurpillat, Merrill Moores, A. E. Dickey and W. M. Aydelotte, for State.

HOWARD, C. J.—The appellant and his brother, Bert Sutherlin, were charged by affidavit and information with having committed rape upon the prosecuting witness, Mary Freet. The appellant was found guilty as charged, and the jury further found that he was, at the date of the verdict, over sixteen and less than thirty years of age. Thereupon he was fined and disfranchised, and was sentenced to the reformatory "for a term not less than one year and not more than twenty-one years."

The case was set down for trial on the last day of the October term, 1897, of the Starke Circuit Court, and was upon that day submitted to the jury. A part of the evidence having been heard, the following order of court was made: "This trial having been begun and [being] now in progress, and the expiration of the time fixed by law for the continuance of the present term of this court having expired, and

Sutherlin v. The State.

the trial of this cause not being finished, the present term of this court be and the same is hereby prolonged and extended to transact and enforce all matters which shall be necessary for the determination of this cause; and the present term of this court be and the same is hereby not deemed to be ended until this cause shall be fully disposed of by the court; and the further hearing of this cause is now fixed and set down for next Thursday the 11th day of November, 1897." To the order of continuance so made the appellant at the time excepted.

The able and accomplished counsel for appellant thus briefly and clearly states the question for decision under the ruling complained of: "This court judicially knows that the term of the Starke Circuit Court ended by limitation on Saturday the 6th day of November, 1897, and that the legal term of the Pulaski Circuit Court commenced on Monday the 8th day of November, 1897; and the court also judicially knows that the counties of Starke and Pulaski constitute one judicial circuit, and that the several terms of the courts in these counties are presided over by the same judge. The trial court, in the case at bar, undertook to proceed under the provisions of section 1442, Burns' R. S. 1894 (1379, R. S. 1881), which provides that should a term end during the trial of a cause, the court may continue the term and hear the cause until finished. It was held in *Wayne Pike Co. v. Hammons*, 129 Ind. 368, that the adjournment of the trial of a cause which is in progress the last day of the term to a subsequent day when the trial is again resumed is not an adjourned term but a continuation of the existing term. And but for the fact that the Pulaski Circuit Court was regularly in session, or could have been in session, the action of the court, in continuing the trial over and beyond the term, could not

Sutherland v. The State.

be questioned, as has been decided in *Walker v. State*, 102 Ind. 502; but the day to which the cause was adjourned was a day when the circuit court of Pulaski county was, or could have been, legally in session, and our contention is, that as this was an attempt to continue the term of the Starke Circuit Court to a time when, under the law, it could not legally be in session, the court erred."

The clear statement thus made by counsel is, as we think, a sufficient refutation of his ingenious contention. The facts of the case, taken in connection with the statutes and decisions cited, show that the trial took place during a legally continued term of the Starke Circuit Court. Hence, even if, in so continuing and presiding at the Starke term of court, the judge should have neglected his duties in relation to the Pulaski Circuit Court, it would not follow that the trial had at the legally extended Starke term of court was in any respect erroneous. Litigants in the Pulaski court might possibly have cause to complain, but we fail to see how this could in any manner affect the rights of the appellant. His cause was not neglected, but was duly prosecuted in accordance with the express terms of the statute. The question raised by counsel has not been directly raised heretofore in this State, but there can be no doubt that the court acted in conformity with the provisions of the statute. *Wayne Pike Co. v. Hammons, supra*; *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545.

But we are unable to see how there was any wrong done even in relation to the Pulaski court. If the judge of the circuit, by reason of his duties in Starke county, was unable to preside at the opening of the Pulaski court, the statutes provided the means of supplying his place. By section 1447, Burns' R. S. 1894 (1383a, Horner's R. S. 1897), it is provided that,

Sutherlin v. The State.

"If, from any cause, any judge of a circuit court shall be unable to attend and preside at any term of said court, or during any day or part of such term, such judge, or in his absence, or when he shall be unable to make such appointment, the clerk, auditor, and sheriff of the proper county, or a majority of them, may appoint, in writing, any other judge of a court of record of this State, or any attorney thereof eligible to the office of such a judge, to preside at such term, or during any day or part of said term." Other statutes providing for the appointment of special judges are section 1444 Burns' R. S. 1894 (1381 R. S. 1881); section 1445, Burns' R. S. 1894 (1382, R. S. 1881); section 1446, Burns' R. S. 1894 (1383, R. S. 1881); and section 1448, Burns' R. S. 1894 (1384, R. S. 1881).

It is also contended that the court erred in refusing to sustain appellant's motion for a new trial, chiefly for the reason, as said, that the evidence is not sufficient to support the verdict. The evidence of the prosecuting witness certainly supports the verdict, and is corroborated, as we think, by the admitted circumstances and history of the case. She was but seventeen years of age and on her way home from a visit when she was attacked in a lonely place on the road. After her release by her assailant, she sought protection at the nearest house and complained to her mother as soon as she reached home. She went at once with her parents to the county seat where she was examined by the physicians and made affidavit for the arrest of appellant and his brother. Her evidence is further corroborated by admissions made in court as to her parents' testimony, also by the evidence of the physician, and the officers and even by that of appellant's brother. The constable who assisted in making the arrest testified that Bert Sutherlin, who was married, then said to appellant: "Fred, you take the

Roller et al. v. Kling et al.

blame in this matter. You are young and have money and a guardian, and can stand it better than I can." We do not find any error in the record. Judgment affirmed.

ROLLER ET AL. V. KLING ET AL.

[No. 18,188. Filed March 31, 1898.]

SPECIAL VERDICT.—Improper Interrogatories.—Harmless Error.—It is error to submit to a jury interrogatories calling for evidentiary facts or conclusions of law; but such error is harmless for the reason that the court in applying the law to the special verdict is required to disregard such interrogatories and the answers thereto. pp. 160, 161.

SAME.—Proper Instruction When Special Verdict is to be Returned.—Where a special verdict is to be returned, it is only proper for the court to instruct the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury to understand clearly their duties concerning such special verdict, and the facts to be found therein. pp. 161, 162.

SAME.—Instructions as to the Law.—Harmless Error.—Practice.—Where a special verdict is to be returned, general instructions as to the law of the case are not necessary, and available error cannot be predicated upon the giving of such. p. 162.

WILLS.—Proof of Insanity Prior to Execution of Will.—Burden of Proof as to Return of Sanity at the Time of Execution.—In an action to set aside a will on the ground of mental unsoundness, proof on the part of the plaintiff that the testator, prior to the time of the execution of the will, was a person of unsound mind, not from a temporary cause, does not require the defendant to show by a preponderance of the evidence a return of sanity, or a lucid interval, at the time of the execution of the will. pp. 162, 163.

INSTRUCTIONS.—Erroneous.—When Not Cured.—Where, in an action to set aside a will on the ground of mental unsoundness of the testator, the proof establishes testator's unsoundness of mind prior to the execution of the will, an erroneous instruction, as to the burden of proof as to a return of sanity at the time of the execution of the will, is not cured by general instructions, as to the burden of proof, which state the law correctly. pp. 163, 164.

WITNESS.—Impeaching Question.—Form Of.—A question put to an impeaching witness need not be in the exact words of the question asked of the witness sought to be impeached, but the words should

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Roller et al. v. Kling et al.

be identical as to time, place, and substance, and the impeaching question should be so framed as to admit of a negative or affirmative answer. *pp. 165-167.*

From the Allen Circuit Court. *Reversed.*

J. F. Rodabaugh, W. E. Colerick and W. G. Colerick, for appellants.

J. M. Robinson, Henry Colerick and J. E. K. France, for appellees.

MONKS, J.—This action was brought by the appellees to set aside the will of their deceased father, John Roller, and the probate thereof, on the alleged grounds that he was of unsound mind at the time of its execution, and that the will was unduly executed. The issues formed were tried by a jury, and a special verdict returned on which the court, over the joint and several motions of appellants for a new trial and for judgment in their favor, rendered a judgment setting aside the will. The errors assigned and not waived call in question the action of the court in overruling the motions for a new trial and the motions for judgment in favor of appellants.

The special verdict consisted of 136 interrogatories and the answers thereto. At the proper time counsel for appellants objected to the submission to the jury of a number of the interrogatories prepared by appellees, on the ground that they, and each of them, related to matters wholly irrelevant and immaterial to the issues in the case, and called for the finding of evidentiary and not ultimate facts.

If the special verdict includes findings of evidentiary facts, conclusions of law, and matters without the issues, the same are to be disregarded by the court in applying the law to the facts found. *Louisville, etc., R. W. Co. v. Bates, Admr.*, 146 Ind. 564, 570, 571;

Roller *et al.* v. Kling *et al.*

Fisher, Admr., v. Louisville, etc., R. W. Co., 146 Ind. 558, 561. It was the duty of the court, therefore, to submit to the jury only such interrogatories as would require the jury to find the ultimate facts within the issues made by the pleadings, and not to embarrass and confuse them by interrogatories which merely called for evidentiary facts, conclusions of law, and matters without the issues. At the request of appellees the court submitted 102 interrogatories to the jury, prepared by them. It is true, as contended by appellants, that many of these interrogatories should not have been submitted to the jury and that it was error so to do. In *Bower v. Bower*, 146 Ind. 393, 398, there was a special verdict under the special verdict law of 1895, the same as in this case, and this court held that the answers to the three interrogatories set forth in said opinion were sufficient to set aside the will. While it was error for the court to submit many of the interrogatories to the jury, yet the error was harmless, for the reason that the court, in applying the law to said special verdict, was required to disregard such interrogatories and the answers thereto. *Louisville, etc., R. W. Co. v. Bates, supra*; *Fisher, Admr., v. Louisville, etc., R. W. Co., supra*; *Branson v. Studabaker*, 133 Ind. 147, 148.

Objections are urged by appellants against a number of instructions given by the court to the jury, and several of said instructions no doubt contain erroneous statements of the law under the decisions of this court in *Blough v. Parry*, 144 Ind. 443, *Young v. Miller*, 145 Ind. 652, and *Teegarden v. Lewis*, 145 Ind. 98. If a general, instead of a special, verdict had been returned, such erroneous instructions might have required the reversal of the cause. The rule is that when a special verdict is returned, it is not proper for

Roller *et al.* v. Kling *et al.*

the court to give any general instructions as to the law of the case. It is only proper for the court in such case to instruct the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict and the facts to be found therein, *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18, 28; *Woollen v. Wire, Admr.*, 110 Ind. 251, 253; *Louisville, etc., R. W. Co. v. Hart*, 119 Ind. 273, 285 and cases cited; *Johnson, Admr., v. Culver, Admr.*, 116 Ind. 278, 294; *Stayner v. Joyce*, 120 Ind. 99, 100; *Swales v. Grubbs*, 126 Ind. 106, 110; *Louisville, etc., R. W. Co. v. Lynch*, 147 Ind. 165, 173, 174, and cases cited. As the verdict returned in this case was a special verdict, general instructions as to the law, though erroneous, were harmless. *Louisville, etc., R. W. Co. v. Frawley, supra*; *Swales v. Grubbs, supra*.

One of the instructions, however, given by the court to the jury, to which objection is made, was concerning the burden of proof. The part of said instruction to which objection is urged is as follows: "If the evidence satisfies you that at any time prior to the execution of said will that John Roller was a person of unsound mind, then the law presumes that that condition of mind continued, unless the mental unsoundness was from some merely temporary or transitory cause; and if the evidence satisfies you that at any time prior to the execution of said will said John Roller was a person of unsound mind, not from a temporary cause, *then the burden of showing a return of sanity, or a lucid interval, at the time of the execution of the will, rests upon the defendants, and must be shown by them by a preponderance*

of the evidence." This instruction, so far as it informed the jury that the burden of proof concerning the unsoundness of mind of the testator at the time of the execution of the will was upon the appellants under the conditions stated, was erroneous. The appellees, by bringing this action to set aside said will and the probate thereof, assumed the burden of showing, by a preponderance of the evidence that the testator did not, at the time the will was executed, have testamentary capacity. It is true that, if unsoundness of mind of a permanent nature has been established by the party having the burden of proof, the presumption is that the same continues until the contrary is shown. *Wallis v. Luhring*, 134 Ind. 447, 450; *Raymond v. Wathen*, 142 Ind. 367, 370. But it is equally true that, in order to remove such presumption, the party not having the burden of proof as to such fact or allegation is not required to prove the contrary, by a preponderance of the evidence, but it is sufficient if the scales are evenly balanced, so that there is no preponderance either way. In such case the party having the burden of proof, cannot recover. *Young v. Miller*, *supra*, 652. Such instruction was clearly erroneous so far as it required appellants, under the conditions stated, to prove by a preponderance of the evidence that the testator was of sound mind at the time the will was executed.

Appellees claim, however, that said instruction was harmless, because the jury was properly instructed as to the burden of proof in other instructions. It is true that in other general instructions the court informed the jury that appellees must prove their case by a preponderance of the evidence, but such instructions would not cure said error. This could only be done by plainly withdrawing the erroneous instruction from the jury, and the instruc-

Roller *et al.* v. Kling *et al.*

tions referred to did not do this. *Wenning v. Teeple*, 144 Ind. 189, 194, 195, and cases cited. Besides, the instructions referred to were general and did not apply to the conditions stated in said instruction ten, and did not, therefore, cure the error in giving said instruction. If, however, we are in error and they did apply, then they and said instruction ten were inconsistent, and calculated to mislead the jury or leave them in doubt. *Wenning v. Teeple*, *supra*, and cases cited. As it is not shown by the record that said error was harmless, the same will be presumed prejudicial.

It is insisted by appellants that the sixth instruction was erroneous, because it stated that, "in order to make a valid will a person must *know* the extent and value of his property, etc." In support of this insistence appellants contend that, the capacity to know and understand the nature and extent of the property disposed of by the will must exist at the time the will is executed, but it is not true that actual knowledge or understanding of the nature and extent of the property disposed of by the will is necessary to the validity of the will, and that the question is one of capacity to know and understand and not of actual knowledge, and the want of knowledge is not the test of the existence of the capacity to know and understand. *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606, 608; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 505; *Blough v. Parry*, 144 Ind. 463, 489, and cases cited. The standard established by the decisions of this court is that one who has sufficient mind to know and understand the business in which he is engaged, who has sufficient mental capacity to enable him to know and understand the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty, and who can keep these in his

mind long enough to have his will prepared and executed, has testamentary capacity. *Blough v. Parry*, *supra*, and cases cited; *Teegarden v. Lewis*, 145 Ind. 98, 101, and cases cited. We need not decide as to the correctness of said instruction six, however, for the reason that as the verdict in the case was a special verdict, said instruction, if erroneous, was harmless. *Louisville, etc., R. W. Co. v. Frawley*, *supra*, and authorities heretofore cited. It is proper to say that some of the interrogatories submitted to, and answered by the jury were drawn upon the same theory as said instruction six.

It is next insisted that the court erred in permitting Caroline Kling, one of the appellees, while testifying as a witness for appellees, to relate a conversation that occurred between John F. Rodabaugh, who was one of the attesting witnesses to the will, and herself, after the execution of the will, on an occasion when she consulted him about the same. Appellees contend that this evidence was introduced after a foundation for the impeachment of said Rodabaugh had been laid. Counsel for appellees have not referred to the record by page and line where any question or questions proper for such purpose were propounded to said Rodabaugh, but, for the determination of this objection, we will assume that the proper questions were propounded to him, and that he answered them in such a way as authorized the calling of witnesses to contradict him by proving that he made statements out of court in the presence and hearing of such witness contrary to his testimony in court. When Mrs. Kling was called as a witness, the established rule required that the question to such impeaching witness, as to time, place and substance of the conversation or statement relied upon as being contrary to the testimony of the

Roller et al. v. Kling et al.

witness, Rodabaugh, should have been identical with the question propounded to said Rodabaugh, and should have been so framed as to admit of a negative or an affirmative answer. *Pence v. Waugh*, 135 Ind. 143, 156. No such question was propounded by counsel for appellees to Mrs. Kling, but she was asked to state what Rodabaugh said to her about the will and her father, and over the objection of appellants, the court permitted her to answer said questions. This was contrary to the rule stated in *Pence v. Waugh*, *supra*, 156, 157.

It is also urged that the court erred in permitting Thomas Greer, a witness for appellees, to give in evidence a conversation between him and appellant Jacob Roller, one of the devisees under the will, in the absence of his co-devisee the appellant William Roller, relative to the mental condition of the testator, citing *Hayes v. Burkam*, 67 Ind. 359; *Shorb v. Brubaker*, 94 Ind. 165; *Ryman v. Crawford*, 86 Ind. 262, 267.

Under the authorities cited the admission of one of several contestants that the testator was of unsound mind is not admissible in evidence. Appellees insist that such evidence was given to impeach said Jacob Roller, one of the appellants, who had testified as a witness on behalf of appellants, and that a foundation for such impeachment had been laid by propounding a proper question to him, which he had answered in the negative. We are not, however, referred to the page and line of the record where such fact is shown as required by the rules of this court, we will however assume that the record so shows. When Greer was called by counsel for appellees to testify, he did not propound to him any question asked of Roller, but merely asked him to state what Roller said to him in a certain conversation and what he, the witness, said to Roller, and over the objection of appellants

the court permitted said witness to answer the question and give the conversation in detail, in violation of the rule concerning the impeachment of witnesses heretofore stated. *Pence v. Waugh, supra*, pp. 156, 157. A large part of the evidence so given by such witness was not admissible for the purpose of impeachment, and was clearly injurious to appellants.

In *Pence v. Waugh, supra*, p. 156, this court said: "While we do not insist that the question to the impeaching witness should be in the exact words of the question asked the witness sought to be impeached, we do hold that as to time, place, and substance of the conversation or statement, it should be identical, and should be so framed as to admit of a negative or affirmative answer. This has been the rule of practice in the trial courts of this State, without exception, so far as we are advised, and we have no doubt that is the safer and better practice, for, as said in *Sloan v. New York, etc., R. R. Co.*, 45 N. Y. 125, if it were 'otherwise, hearsay evidence, not strictly contradictory, might be introduced, to the injury of the parties, and in violation of legal rules.'" Under this rule when the impeaching witness answers the proper question, the party introducing such witness has no right to examine such witness as to such conversation in detail. The details of such conversation can only be brought out by the cross-examination of the party whose witness is sought to be impeached. *Pence v. Waugh, supra*, p. 157. It follows that the court erred in permitting said impeaching witnesses, Kling and Greer, to testify as to the said conversations in detail, in answer to general questions, instead of confining their examination by counsel for appellees to answering the same questions propounded to the witness sought to be impeached. *Pence v. Waugh, supra*, p. 156. Other questions are discussed by counsel for appellants, but as they may not arise on

Center School Township v. State, *ex rel.* Board, etc.

another trial it is unnecessary to consider the same. The judgment is reversed, with instructions to sustain appellants motion for a new trial, and for further proceedings not in conflict with this opinion.

CENTER SCHOOL TOWNSHIP v. STATE, EX REL. BOARD
OF SCHOOL COMMISSIONERS OF THE CITY OF
INDIANAPOLIS.

[No. 18,310. Filed March 31, 1898.]

TOWNSHIP TRUSTEE.—*Surplus Dog Tax Fund.*—An action may be maintained against a school township by the board of school commissioners of a city located in such township for the recovery of surplus dog tax funds wrongfully appropriated by the township trustee to the use and benefit of the school township. *p. 170.*

PLEADING.—*Estoppel.*—Facts creating an estoppel, to be available, must be specially pleaded. *p. 173.*

OVERRULED CASES.—*Last Decision the Law.*—A decision of a court of last resort is but an exposition of what the court construes the law to be, and in overruling a former decision the court does not declare the overruled decision to be bad law, but that it never was the law, and the court was simply mistaken in regard to the law in its former decision; the first decision is wholly obliterated, and the law as therein declared must be considered as though it never existed, and that the law always has been as expounded by the last decision. *p. 173.*

SAME.—*Vested Rights.*—Courts will not apply a change made in the construction of the law, as it was held to be in the overruled case, so as to invade vested rights. *p. 173.*

TOWNSHIP TRUSTEE.—*Surplus Dog Tax Fund.—Overruled Cases.—Vested Rights.*—Where dog tax funds were appropriated to the school township by the township trustee, under a construction placed upon the law by the Supreme Court, the township did not thereby obtain such a vested right in such funds as to prevent the recovery thereof by the board of school commissioners of a city located in such township, under a decision of the Supreme Court overruling the former decision. *pp. 174-176.*

From the Marion Superior Court. *Affirmed.*

T. S. Rollins, D. L. Wilson and W. A. Yarling,
for appellant.

Charles A. Dryer, for appellee.

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Center School Township *v.* State, *ex rel.* Board, etc.

JORDAN, J.—The State of Indiana, on the relation of the board of school commissioners of the city of Indianapolis, instituted this action against Center school township, of Marion county, Indiana, to recover money arising out of the surplus dog tax fund which it is claimed was due to said board of school commissioners for the years 1893, 1894, and 1895. The complaint is in four paragraphs, three of which are similar, and, in their order, separately seek to recover the fund withheld from the relator by the defendant's trustee for the aforesaid years, and by him appropriated and used for the benefit of the public schools of said Center school township. The fourth paragraph is intended to embrace all of the surplus dog fund received and used by the defendant during said years, which it is alleged belongs to the relator, and this latter paragraph is in its nature one for money had and received. The charge made by the complaint against the appellant is in substance and to the effect that on the first Monday in March in each of the aforesaid designated years, under section 8654, Burns' R. S. 1894, the dog fund in excess of \$50.00 was by the provisions of said section required by the proper township trustee to be distributed to the school corporation represented by the relator, in proportion to its enumeration for school purposes; that the trustee failed and neglected to discharge this duty, but, on the contrary, appropriated and expended all of said surplus fund in his hands for the benefit and use of the schools of Center school township, and that no part thereof was paid over to or received by the relator for the use of its schools. A demurrer to each of these paragraphs was overruled and the issues were joined between the parties by a general denial and a trial resulted in the court awarding a judgment in

Center School Township v. State, ex rel. Board, etc.

favor of the appellee for the use of the relator for \$13,876.51, being the proportionate part of the surplus fund in controversy to which the trial court held appellee was entitled.

The only question raised and presented by the appellant is the sufficiency of the complaint on demurrer to entitle the appellee to recover of the former the money in dispute. The first insistence of its counsel is that the legal title to the money in controversy, in the theory of the law, was vested in the township trustee, who was the custodian of said money, and that consequently he could appropriate it as he pleased, and if he unlawfully distributed or expended the same, the appellee's remedy, after the demand, would be confined to a suit on the trustee's official bond, and therefore this action cannot be maintained against the school corporation to recover the money in question. Certainly this contention has no legitimate support, and we may pass it without further consideration. The theory presented by the complaint in the action is that under the law a portion of the fund in question should have been distributed by appellant's trustee to the school corporation represented by the relator. That this duty the trustee failed or neglected to perform, but on the contrary distributed to appellant, and it expended through him for the legitimate use and benefit of its public schools, the money which in the first instance belonged to the appellee. Manifestly, under such circumstances, the latter would be legally authorized to proceed against appellant in an action for money had and received, and would be entitled to recover that which the law awarded to it and which had been wrongfully appropriated to the use and benefit of appellant. This doctrine the authorities fully support. *Jefferson School Township v. School Town of Worthington*, 5

Center School Township v. State, ex rel. Board, etc.

Ind. App. 586; *Vigo Township v. Board, etc.*, 111 Ind. 170; *Bicknell v. Widner School Township*, 73 Ind. 501; *First Nat'l Bank v. Union School Township*, 75 Ind. 361; *Killian v. State, ex rel.*, 15 Ind. App. 261; *Shelby Township v. Randles*, 57 Ind. 390; *Hohl v. Town of Westford*, 33 Wis. 323; *Merrill v. Marshall County*, 74 Iowa 24, 36 N. W. 778.

If appellant, a public corporation invested under the statute creating it with the power to sue, and also liable to be sued, has received money belonging to and due the relator, which has been legitimately expended, as alleged, for the use and benefit of its public schools, then the law imposes upon it the duty to refund such money. Such duty arises out of the general obligation which the law exacts in the interest or support of justice, and this rule is applicable alike to individuals and corporations, private or public. *Dillon Municipal Corp.*, section 461; *Argenti v. City of San Francisco*, 16 Cal. 255.

By the construction placed upon section 8654, *supra*, in the decisions of this court in *Taggart v. State*, 142 Ind. 668, and *Gold v. State*, 143 Ind. 706, the appellee's right to its proportionate part of the surplus dog tax in the hands of the township trustee of Center school township for the years in question is settled in its favor. In the *Taggart* case this court expressly overruled that of *School City of South Bend v. Jaquith, Tr.*, 90 Ind. 495, wherein under the provisions of section 5 of an act of the legislature of 1881, section 2651 R. S. 1881, which were in effect the same as are those in section 8654, *supra*, it was held that no part of the surplus dog fund belonged to the city school corporation, but that such fund belonged to and should be distributed wholly to the school township. Counsel for appellant do not insist but what the construction given to the statute in the *Taggart* appeal was cor-

Center School Township v. State, *ex rel.* Board, etc.

rect, and virtually concede that the decision in the case of *School City of South Bend v. Jaquith, Tr., supra*, was properly overruled. But their principal contention in support of this appeal, seemingly, is that our decision overruling the case must not be held to be retrospective and thereby invade what they term the vested rights of the appellant to the money in controversy. Counsel propound the following question, which they urge as the principal one involved, namely: "Will the rights of the parties to the funds sued for in this cause be determined by the law as it is now declared to be, or by the law as it was declared to be by this court at the time it is claimed the appellant, Center school township, obtained the funds sued for herein? In other words, when this court has construed a statute and announces what the law is as prescribed by such statute, and such interpretation is different from the one before given to the statute, which means the same as the one last construed, and the rights of parties have attached under the former statute, and officers and parties acted in good faith in fixing such rights, will the law as lastly pronounced by this court have to be given such a retroactive effect as to take away rights and change the entire relation of parties, or will it act and operate only prospectively?"

The case of *Taggart v. State, supra*, was decided on March 21, 1895, and it is insisted that appellant's trustee, relying upon what this court had by its former decision declared the law to be, acted in good faith in appropriating the money in question to the use and benefit of the schools of Center township before a change in the construction of the law occurred; hence the right of appellant to the use of the fund, in any view of the case, ought not to be disturbed by the interpretation placed on the statute in *Taggart v.*

State. But even though it could be said that any elements of good faith or estoppel in any manner enter into the case at bar, they are not presented by the complaint, and, if they existed, in order to have been available, they should have been interposed by way of an answer; for the settled rule is that facts creating an estoppel must, under our code, be specially pleaded. *Robbins v. Magee*, 76 Ind. 381; *City of Delphi v. Startzman*, 104 Ind. 343.

Passing, however, to the consideration of what is regarded by the parties as the real question in issue—that is to say: Shall we confine the change made in the interpretation of the law by the Taggart case so as to operate prospectively only, and thereby not affect appellant in its claim to the entire surplus dog fund distributed to and received by it prior to March 21, 1895; or shall the new construction of the statute be held to be binding on it as to the money in dispute?

The decisions of a court of last resort, the authorities assert, are not the law, but are only the evidence or exposition of what the court construes the law to be, and in overruling a former decision by a subsequent one the court does not declare the one overruled to be bad law, but that it never was the law, and the court was therefore simply mistaken in regard to the law in its former decision. The first decision, upon the point on which it is overruled, is wholly obliterated, and the law as therein construed or declared must be considered as though it never existed, and that the law always has been as expounded by the last decision. *Haskett v. Maxey*, 134 Ind. 182; *Ram's Legal Judgments*, 47.

This rule, however, is subject to the well settled doctrine that courts will not so apply a change made in the construction of the law as it was held to be in the overruled case, as to invade what is considered

Center School Township v. State, *ex rel.* Board, etc.

vested rights, or, in other words, while as a general rule, the law as expounded by the last decision operates both prospectively and retrospectively, still, courts are required to and do confine it in its operation so as not to impair vested rights, such as property rights or those resting on contracts express or implied. *Haskett v. Maxey, supra*; *Stephenson v. Boody*, 139 Ind. 60.

The true rule affirmed by the authorities, and the prevailing one, is to give a change of judicial construction in regard to a statute the same effect in its operation so as not to disturb vested rights as would be given to a legislative amendment—that is, apply the change in the interpretation of the law so as to operate prospectively and not retroactively. *Douglas v. County of Pike*, 101 U. S. 677.

But the rights which the law protects must be real. They must be rights of property, or those founded on contracts express or implied. Sutherland on Statutory Construction, section 164, states the rule in this respect as follows: "When a right has arisen on a contract, or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it or an action for its enforcement. It has become a vested right which stands independently of the statute. * * * This is a principle of general jurisprudence; but a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another."

But can appellant in any sense, under the facts and

Center School Township v. State, *ex rel.* Board, etc.

circumstances in this case, be said to have acquired a vested right to the surplus dog fund involved in this action so as to bring it within the protection of the rule to which we have referred, and thereby be entitled to deny appellee's right of recovery? It is evident that the money received by it under the construction placed on the law by a former decision of this court was not embraced in any contract or property rights in the legal acceptance of those terms. The fund out of which the money in dispute was distributed to appellant was collected and accrued under legislative authority, and, in a legal sense, was the property of the State, and the surplus certainly was subject to be disposed of or applied by legislative authority to any public purpose not inconsistent with the constitution. Appellant is a public corporation. The creature of the legislature; or, in other words, but an instrument in the hands of the latter to carry out its will in regard to the common school system of the State, and therefore at all times, in respect to the control or disposition of its funds, it is subject to the will of the law-making power, provided, of course, that such will must not be so exercised as to disturb existing contract rights. The rule is well settled that the control of the State over a public corporation is subject to no such limitations as operate in favor of corporations of a private character; consequently the law makes a distinction between the rights of the individual or private corporations and those of a public corporation.

It must follow as a necessary result of these principles, which are controlling over appellant, that it, under the circumstances, is not in a position to raise any question in respect to vested rights which it claims were invaded by the change in judicial construction of the statute providing for the disposition

Hockemeyer *et al.* v. Thompson.

of the surplus dog fund. *Taggart v. State, supra*; Endlich on Int. of Statutes, section 284; Wade on Retroactive Laws, sections 21, 22; *People v. Morris*, 13 Wendell 325; Beach on Pub. Corp., sections 720, 721, 722.

Appellant, therefore, having received the money through a judicial misinterpretation of the law, can not be successfully heard to deny appellee's right thereto which existed in the first instance, under the proper construction of the statute whereby the legislature had declared its will in respect to the disposition of the surplus dog fund.

The complaint is sufficient, and the judgment is therefore affirmed.

HOCKEMEYER ET AL. v. THOMPSON.

[No. 18,889. Filed Jan. 5, 1898. Rehearing denied March 31, 1898.]

COURTS.—*Jurisdiction.*—*Allen Superior Court.*—*Drains.*—*Appeals.*—

The act creating the Allen Superior Court, and giving it "concurrent jurisdiction with the circuit court in all cases of appeals from * * * boards of county commissioners or city courts in civil cases," etc., authorizes an appeal thereto from a judgment of the board of commissioners establishing a drain.

From the Allen Superior Court. *Reversed.*

W. G. Colerick, for appellants.

W. P. Breen and *John Morris, Jr.*, for appellee.

MCCABE, J.—This was a proceeding commenced before the board of commissioners of Allen county for the construction of a ditch, under the provisions of the drainage act of 1881 by county boards. Section 5655 *et seq.*, Burns' R. S. 1894 (4285 *et seq.*, R. S. 1881).

From the judgment of the board establishing the drain, the appellants appealed to the superior court of said county. That court, on appellee's motion, dismissed the appeal on the ground that no appeal to

150	176
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150	176
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that court was authorized by law in such cases. This ruling is assigned as the only error complained of. The superior court of Allen county was created by the act approved March 5, 1877. Acts 1877, p. 43. Section 10 of that act fixes the jurisdiction of that court. It provides that: "Said court, within and for said county, shall have original and concurrent jurisdiction with the circuit court in all civil cases, and jurisdiction concurrent with the circuit court in all cases of appeals from justices of the peace, boards of county commissioners, and mayors of [or] city courts in civil cases, and all other appellate jurisdiction in civil causes now vested in, or which may hereafter be vested by law in the circuit courts, and said court shall also have concurrent jurisdiction in all actions by or against executors, guardians and administrators." The drainage act of 1881 was passed after the act just quoted. The section thereof authorizing an appeal is general, and does not designate the court to which the appeal is to be taken. Section 5671, Burns' R. S. 1894 (4301, R. S. 1881). But it is contended that the provision in the latter part of the section and the next section show that the legislative intent was to confine the right of appeal to the circuit court. The provision in the same section is that the appeal bond is "to be approved by the auditor and the clerk of the circuit court," and that the auditor is to "make a complete transcript of the proceedings, etc., * * * and certify the same, etc., * * * to the clerk of the circuit court." The provision in the next section is that "If more than one party appeal, the judge of the circuit court shall order the cases consolidated and tried together, and the rights of each party shall be separately determined by the jury in its verdict." Section 5672, Burns' R. S. 1894 (4302, R. S. 1881). As the section of

Hockemeyer et al. v. Thompson.

the act creating the superior court to some extent relates to the same matter involved in the provisions of the drainage act authorizing an appeal in such cases, the two statutes ought to and must be construed together. The provisions relied on in the drainage act as conferring exclusive jurisdiction on the circuit court do not expressly so provide. The provisions quoted at most only afford grounds for an implication, that the legislature might have meant to confine the right of appeal to the circuit court. And yet the language employed is not necessarily inconsistent with the idea of allowing appeals to both courts where there is a superior court in the county. But the language employed in the superior court act is absolutely inconsistent with the idea that the circuit court alone had jurisdiction of such appeals. It gives the superior court "concurrent jurisdiction with the circuit court in all cases of appeals from * * * boards of county commissioners and mayors of [or] city courts in civil cases, etc." It is suggested that a drainage proceeding under the drainage act is not a civil case, and therefore the act does not confer jurisdiction of appeals on the superior court. To this it may be answered that no other proceeding before the board of commissioners is a civil case in the strict sense, and yet appeals are authorized from boards of commissioners to the superior court. The phrases "civil cases" and "civil causes" as used in the section quoted were evidently used in contradistinction to criminal cases for the purpose of including all cases other than criminal cases. And then the section concludes with the sweeping clause: "and all other appellate jurisdiction in civil causes now vested in, or which may hereafter be vested by law in the circuit courts." This language was evidently intended to vest all appellate jurisdiction in the superior court

Hockemeyer et al. v. Thompson.

which was then vested in the circuit court except in criminal cases, and such jurisdiction as might thereafter be vested in the circuit court by law. Jurisdiction of appeals in drainage proceedings was thereafter vested by law in the circuit court, and by force of the two statutes such jurisdiction became vested in the superior court. To hold otherwise would be so to construe the two statutes as to give one of them no force whatever. And even though we should hold that the drainage act vested the jurisdiction of appeals in such proceedings in the circuit court alone, there is no reason why we should refuse to give effect to the jurisdiction section of the superior court act, providing that it should have all other appellate jurisdiction thereafter vested by law in the circuit courts. Therefore, we hold that the superior court had jurisdiction of the appeal. The superior court erred in dismissing the appeal. The judgment is reversed, and the cause remanded, with instructions to overrule appellee's motion to dismiss the appeal, and for further proceedings not inconsistent with this opinion.

ON PETITION FOR REHEARING.

MCCABE, J.—Appellees learned counsel, in support of their petition for a rehearing, say: "It seems to us that appellant's counsel, as well as the court, has misapprehended the meaning of the words, *all other appellate jurisdiction in civil causes now vested in or which may hereafter be vested by law in the circuit courts*. The words 'and all other appellate jurisdiction in civil causes now vested in, or which may hereafter be vested by law in the circuit courts,' can not refer to appeals from boards of county commissioners. The superior court was sufficiently given jurisdiction of appeals from boards of county commis-

Hockemeyer et al. v. Thompson.

sioners, and, therefore, 'other appellate jurisdiction' must refer to something besides appeals from boards of county commissioners. Otherwise the word 'other' would have no meaning."

If the language of the jurisdictional section 10 of the Allen county superior court act, preceding the language just quoted therefrom, includes jurisdiction of appeals in drainage proceedings, then appellee's contention that the words just quoted did not include it is right. But in that case the jurisdiction of such appeals would be conferred on the superior court of Allen county, making the action of that court in dismissing the appeal erroneous, unless we were wrong in holding in the original opinion that the phrase "civil cases" and "civil causes" "were evidently used in contradistinction to criminal cases for the purpose of including all cases other than criminal cases." But appeals from boards of commissioners in drainage proceedings under the drainage act of 1881 could not very well have been intended to be included in the language, "in all cases of appeals from * * * boards of county commissioners," employed in the fore part of section 10 of the act of 1877, because the right of appeal in drainage proceedings under the drainage act of 1881 did not then exist. And hence the language in the concluding part of the section vesting in the Allen superior court "all other appellate jurisdiction in civil causes now vested in or which may hereafter be vested in the circuit courts" necessarily vested in the superior court all appellate jurisdiction in civil causes which was then vested in the circuit court, or which might thereafter be vested in the circuit court. Now, appellee's contention is that the appellate jurisdiction involved in this case was afterwards vested in the circuit court. Such a result, however, is only reached by an implication from the language employed in the

drainage act of 1881. But, concede that it was expressly conferred on and vested in the circuit court by that act, so long as it was not thereby vested exclusively in the circuit court, there is no excuse furnished by appellee's counsel for refusing to give effect to the language of the superior court act vesting in that court the same appellate jurisdiction that was afterwards vested in the circuit court. And the learned counsel do not even pretend that there is any language in the drainage act of 1881 vesting jurisdiction of appeals in such cases exclusively in the circuit court. They do, however, contend and cite an overwhelming list of cases to the effect that when a new right is created by a statute and a remedy provided, that such remedy is exclusive of all others. They also complain that we did not notice this proposition in our original opinion. Our reason for ignoring it was that the proposition, though well founded in law, had no sort of application to the case. It may be conceded that the drainage law created a new right, and that one of the remedies provided for aggrieved persons interested in proposed drainage was an appeal to a court of common law jurisdiction where a trial could be had by a jury. Whether the appeal thus allowed should be exclusively to one of two courts of concurrent jurisdiction, or to either, at the option of the appealing party, is simply a question to be settled by the proper construction of the statutes involved. And whether the appeal is allowed to one court exclusively, or to either of the two, it is the same remedy and not a different remedy.

But if a drainage proceeding is not a "civil case," or a "civil cause" within the meaning of the superior court act, as was earnestly asserted by appellee formerly, and in this petition, without citing any authority in support thereof, then appellee's contention

Hockemeyer *et al.* v. Thompson.

that no appeal lies to the superior court in such cases must prevail.

It is provided by statute that the construction of all statutes of this State shall be by the following rules: "First. Words and phrases shall be taken in their plain, or ordinary and usual sense. But technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import." Section 240, Burns' R. S. 1894 (240, R. S. 1881).

Webster's Unabridged Dictionary defines the ordinary meaning of the word "civil" to be "Relating to rights and remedies sought by action or suit distinct from criminal proceedings." Bouvier's Law Dictionary defines the legal or technical meaning of the word "civil" to be: "In contradistinction to criminal, to indicate the private rights and remedies of men, as members of the community, in contrast to those which are public and relate to the government; thus, we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction." Anderson's Law Dictionary defines the word thus: "Concerning the rights of and wrongs to individuals considered as private persons, in contradistinction to criminal or that which concerns the whole political society, the community, state, government: as, civil-action, case, code, court, damage, injury, * * * proceeding, procedure, process, remedy * * * ." Law is said to be the perfection of reason, especially in a case like the present one, of first impression. And the courts are no more justified in casting aside the lamp of reason as a guide to their footsteps than they are in overriding and disregarding long established principles by courts of highest authority.

Thus it would seem that there is absolutely no reasonable or logical escape from the conclusion formerly

Watson et al. v. Finch.

reached by us that the words "civil cases" and "civil causes" are to be construed, and we are imperatively required to construe them as including all cases other than criminal cases. That being so, it follows inevitably from that conclusion, that jurisdiction of appeals from boards of commissioners in drainage proceedings is vested in the superior court of Allen county.

The argument of appellees learned counsel that if appeals are allowed to both courts it might result in great confusion by one of them deciding a case involving the validity of the drainage proceedings appealed from in one way, and the other decide another appeal involving the same question the other way, all of which would have been very potent if it had been addressed to the lawmaking power. But when addressed to this court it must fail, because this court has not been clothed with power to make laws. Petition overruled.

WATSON ET AL. v. FINCH.

[No. 18,110. Filed Nov. 16, 1897. Rehearing denied March 31, 1898.]

APPEAL.—*Transcript.*—*Must be Authenticated by Signature of Clerk.*

—The transcript of the record of the proceedings in the court below must be authenticated by the signature of the clerk of such court.

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156	630
150	183
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157	509

From the Marion Superior Court. *Affirmed.*

Soale & Grimes and *Smith & Korbly*, for appellants.

Finch & Finch, for appellee.

JORDAN, J.—The appellee successfully prosecuted this action in the lower court to foreclose a mortgage upon certain real estate. From the judgment recovered appellants appeal and assign error upon the rulings of the lower court. At the very threshold of the examination of the transcript, in order to ascer-

Watson *et al.* v. Finch.

tain if the rulings of which appellants complain are thereby disclosed, we are confronted by the contention of appellee in his brief that no question is presented for our consideration, for the reason that what purports to be a transcript of the record below is not authenticated by the signature of the clerk of the lower court. Appended to this transcript is a form of a certificate in which it is stated that, "In testimony whereof I do hereunto subscribe my name and affix the seal of said superior court on the 15th day of August, 1896," but no name is subscribed to this certificate. The transcript was filed in this court on November 7, 1896, and no steps have been taken by the appellants to have it properly authenticated. Section 661, Burns' R. S. 1894 (649, R. S. 1881), requires that the clerk on appeal "shall forthwith make out and deliver to the party, at his request, or transmit to the clerk of the Supreme Court, the transcript of the record in the cause * * * certified and sealed." That the statements contained in the certificate should be authenticated by the clerk, subscribing his name thereto and affixing the seal of the court, is the imperative requirement of the above section of the code. See *Conkey v. Conder*, 137 Ind. 441, and authorities there cited.

All appeals in this court are tried by the record. It is the only legitimate evidence to establish the rulings of the trial court upon which alleged errors are based. In the absence of the transcript being authenticated, as required by the statute, it cannot be considered or treated as a copy of the original record, and therefore cannot be received or used as evidence to sustain appellants' complaint, and the appeal must fail. *Campbell v. State*, 148 Ind. 527.

In *Miller v. Evansville, etc., R. R. Co.*, 143 Ind. 570, on page 573, it is said: "The duty rests upon parties

§ Clow et al. v. Brown et al.

or their counsel, in appeals to this court, to carefully examine the transcript and ascertain if the clerk has properly and correctly prepared the same, and, when necessary, to take timely steps to correct errors therein, and to obtain amendments thereto; and if they suffer judgment to be rendered upon a defective record, the fault must rest upon them." For the reasons stated, the questions which appellants seek to present cannot be sustained, and the judgment is affirmed.

CLOW ET AL. v. BROWN ET AL.

[No. 18,089. Filed Jan. 4, 1898. Rehearing denied April 1, 1898.]

CORPORATIONS.—*Liability of Directors for Corporate Debts.—Fraud.*

—A corporation with a capital stock of \$200,000.00 was organized for the construction and operation of a system of water-works for a city. Three persons who were its sole incorporators became its directors. Although the company had been organized more than eighteen months, no part of the capital stock was paid in or collected, except that the three organizers subscribed for shares to the amount of \$3,000.00, which were paid by allowance to them of that sum for their services as promoters in the organization of the company, and except that the company issued its bonds in the sum \$150,000.00, secured by a mortgage on the property which it should afterwards acquire, by which to procure funds for the construction of the water-works. The company contracted with a firm to construct the water-works, and, in compensation therefor, turned over to said firm the \$150,000.00 bonds, and also issued to said firm the remaining capital stock of the company to the amount of \$197,000.00. There was a secret understanding between the contracting firm and the directors that the firm was to pay one of the directors \$6,000.00 in cash, and to assign to each of the other directors \$20,000.00 of the capital stock. This secret understanding was carried out. For the extension of the water-works system the company contracted a debt of \$4,015.19, which was not paid. Afterwards, on foreclosure of the mortgage given to secure the bonds, the whole plant was sold for \$107,500.00. The corporation published no annual report, as provided by section 5071, Burns' R. S. 1894. *Held*, in an action to recover the indebtedness of \$4,015.19 incurred in extending the system of water-works, that the directors were personally liable. *pp.* 186-197.

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156	223
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159	517
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164	285
164	286

Clow et al. v. Brown et al.

CORPORATIONS.—*Failure to Publish Annual Report.*—*Liability of Directors.*—*Complaint.*—In an action against the directors to recover a debt of the corporation, where the corporation has become insolvent, a cause of action is stated in a complaint which alleges the insolvency of the corporation, the failure to publish the annual report, and that the plaintiffs were misled and damaged thereby. *p. 198.*

PLEADING.—*Indefinite Complaint.*—*Demurrer.*—A demurrer does not raise the question as to whether or not a complaint is sufficiently definite. *p. 199.*

From the Montgomery Circuit Court. *Reversed.*

P. S. Kennedy, S. C. Kennedy and Dumont Kennedy, for appellants.

Benjamin Crane, A. B. Anderson and Charles Martindale, for appellees.

HOWARD, C. J.—This is the third appeal in relation to the subject-matter in controversy between the parties. *Clow v. Brown*, 134 Ind. 287; *Bruner v. Brown*, 139 Ind. 600. In the case now before us the appellants filed their complaint in six paragraphs, the second of which was afterwards withdrawn; and the court sustained a demurrer to each of the others. The ruling on the demurrer presents the only questions for our consideration.

From the first, third, and sixth paragraphs of the complaint, it appears that in the year 1885, under authority of the act for the organization of manufacturing, mining, and other companies (section 5051, Burns' R. S. 1894, 3851, Horner's R. S. 1897, and following sections), the appellees organized a company for the construction and operation of a system of water-works for the city of Crawfordsville, and were duly chosen as directors of said company; that the amount of capital stock was fixed at \$100,000.00, afterwards increased to \$200,000.00; that after the putting in of the water-works plant, the company purchased of appellants certain water pipes, mains, etc., for which, on September 23, 1889, appellants recovered judgment

Clow et al. v. Brown et al.

in the sum of \$4,015.19, which has never been paid; that the company violated the law under which it was organized in many particulars named, to wit, it did not within eighteen months after organization proceed to collect, and has never collected, any part of the designated capital, except that the appellees subscribed for shares to the amount of \$3,000.00, which were paid for by allowance to them of that sum for their services, as promoters in the organization of said company, and except that the company issued its bonds in the sum of \$150,000, secured by mortgage on the property which it should afterwards acquire, by which to procure funds for the construction of the water-works; that the company entered into contract with a firm known as Comegys and Lewis, to construct said water-works and operate them for one year, and, in compensation therefor, turned over to said firm said \$150,000.00 bonds, and also issued to said firm the remaining capital stock of the company, to the amount of \$197,000.00; that the expenses and labor in the construction of the works were wholly paid out of the money realized on the sale of said bonds, and said stock so issued to said firm was of no value, for the reason that nothing was ever paid on it; that the company never had any assets except the plant so built and equipped out of the proceeds of said bonds; that, in 1891, the mortgage securing said bonds was foreclosed, and the works were sold for \$107,500.00; that the appellees were the sole directors of said company during the whole time when the acts and omissions complained of occurred, and by reason of which acts and omissions the company became and is wholly insolvent; that appellees, at the time of contracting the debt due appellants, and at all other times since the issue of the said \$150,000.00 bonds, knew that the company was insolvent. And it is alleged that, by

Clow et al. v. Brown et al.

reason of said acts and omissions of said company and of appellees, a right of action has accrued under said statutes in favor of appellants against appellees as directors.

In the fourth paragraph of the complaint, it is further alleged that, at the time the appellants sold the water-pipes and mains to the company they had no knowledge of the company's insolvency; that said company and all of said directors, from the organization of said company to the present time, failed and neglected to make and publish the annual report required by statute, showing the amount of the capital stock of the company, the amount of the assessments thereon made and paid in, and the amount of the indebtedness of the corporation, in consequence of which failure and neglect so to publish such report appellants had no knowledge of the financial condition of the company, and they were thereby misled and deceived into the belief that said company was solvent and able to pay all debts which it might contract; that at no time since appellants' debt was contracted has said company had sufficient means with which to pay said mortgage indebtedness; and that, had appellants known of the said financial condition of the company, they would not have sold to it the material for which they are here seeking payment.

In the fifth paragraph of the complaint, additional allegations are made, as follows: That in October, 1885, the appellees entered into a written agreement with the city of Crawfordsville to build a system of water-works for which the city was to pay a rental of \$5,000.00 a year for 125 hydrants, and \$30.00 a year for each additional hydrant; that about the same time appellees, for the purpose of building said works, agreed among themselves to form a corporation with a capital stock of \$100,000.00, of which stock each of

appellees should receive \$1,000.00, in paid up stock as compensation for their services in forming such organization; that on the completion of said organization appellees were chosen sole directors, and as such issued to themselves each said \$1,000.00 of stock as paid up, but no payment except such services has ever been made for such stock; that on November 30, 1885, the appellee Martindale transferred his said stock to his son, without consideration, and resigned as director, and entered into a contract with the remaining directors to build said works for \$127,000.00 of the paid up stock and \$120,000.00 of the first mortgage bonds of the company, but with the understanding and agreement that said Martindale was not himself to build said works, but should sell said contract for the benefit of all the appellees; that on March 15, 1886, the capital stock was duly increased to \$200,000.00, and an issue of \$150,000.00 mortgage bonds ordered for the purpose of raising funds to build the works; that on the same day the contract with Martindale was annulled, and a new contract entered into with him, according to which he agreed to build the works for the \$150,000.00 bonds and \$197,000.00 of the paid up stock of the company, it being understood, as before, that Martindale was not himself to build the works, but was to sell the contract for the benefit of all the appellees; that on April 13, 1886, the appellees procured the firm of Comegys and Lewis to take said contract, with the secret understanding had by said firm with appellees that Martindale should be paid \$6,000.00 for procuring said contract for them and that \$20,000.00 of said capital stock should be assigned to each of the other appellees, Brown and Pierce, which money was paid and stock assigned by said firm to appellees in accordance with such secret understanding and agreement; that

Clow et al. v. Brown et al.

Comegys and Lewis had no intention of paying anything for said \$197,000.00 of capital stock, and knew that said water-works when built would be of much less value than the amount of the mortgage bonds encumbering the same; that the appellees Brown and Pierce each accepted his \$20,000.00 of said stock, and continued to hold and vote the same knowing that nothing had ever been paid for it; that, on the completion of said works, they were turned over to said corporation, and said firm was released of all further liability; that nothing has ever been paid for any of said \$197,000.00 stock by said firm, or by any one else; that, at the time appellees accepted said works as so completed, they knew that the same did not exceed in value \$100,000.00, and that they were encumbered by said mortgage of \$150,000.00; that afterwards the city of Crawfordsville, as it had a right to do under its contract with appellees, ordered an extension of said works, whereupon appellees purchased of appellants, on credit, the material for which payment is here sought, and for which judgment was entered in favor of appellants for \$4,015.19, which judgment is in full force and unpaid; that, in consequence of said acts and omissions of appellees, said company is now, and has been insolvent from the 13th day of April, 1886, and has at no time had any property subject to execution, except that so encumbered as aforesaid; by reason of all of which an action has accrued in favor of appellants against appellees.

From the facts set out in the complaint, it cannot be a matter of doubt that the appellees, as sole promoters, incorporators and directors of the Crawfordsville Water-works Company, proceeded in utter disregard of many of the strict requirements of the statutes in such cases made and provided. The annual report, required by section 13 of the act (section 5071, Burns'

R. S. 1894; 3863, R. S. 1881), showing the amount of capital, amount of assessments made on capital and paid in, and the amount of indebtedness of the company was never published. Neither was the capital stock, as required by section 8 of the act (section 5060, Burns' R. S. 1894, 3859, R. S. 1881), or any part of it, paid into the treasury within eighteen months after the organization of the company, or at any other time, unless such payment was made as to \$3,000.00 by the issue of so much paid up stock for services of the promoters, or as to the remainder of the stock by the issue of the same to Comegys and Lewis. As to the \$3,000.00 paid up stock issued to the appellees to pay them for their services as promoters, it may be, according to the reasoning and authorities in *Bruner v. Brown*, *supra*, that the issue can be held lawful, although, in strictness, what was decided in that case is, merely, that a corporation has the right to pay its promoters for such services.

The facts as shown in this case are quite different from those disclosed in *Bruner v. Brown*, and that case cannot therefore control the decision here. It appears here that the incorporators knew that the works could be put in for much less than the money to be realized from the sale of the \$150,000.00 bonds, and that they were in fact put in for far less than that sum; and that when the mortgage was foreclosed, and after the works had been extended, and appellants' pipes and mains had been added to the original plant and sold with it, the whole brought but little over \$100,000.00. The throwing in of the \$197,000.00 capital stock seems to have been made and accepted as a mere gratuity. Indeed it is alleged that the stock when turned over was of no value, as must indeed have been true since nothing had been paid on it. No doubt the appellees, constituting as they did

Clow et al. v. Brown et al.

the whole company, might, as to themselves and the corporation, make a gift of the stock. They could not complain of their own act. But the representation of this stock to the world as paid up, when the payment made was a mere fiction, was nothing short of an imposition upon all those who might deal with the company in good faith.

The statute already cited, section 5060, Burns' R. S. 1894 (3859, R. S. 1881), which requires that "The capital stock, as fixed by such company, shall be paid into the treasury thereof, within eighteen months from the incorporation of the same," means what it says. A sham payment, such as made in this case, was certainly never intended. Incorporators have no right to display an array of paid up stock before the eyes of the public, unless money or property, dollar for dollar, stands behind each share of stock so held out to the world as paid up. If the incorporators cannot afford to pay up all the stock, and can not dispose of it for value, then the shares should be diminished to the number which can be paid up within the time prescribed by the statute, instead of being unduly increased as they were in this case. The capital stock should be, what its name implies, an actual capital, by means of which the business may be carried on, and dealers with the concern made secure from loss.

No doubt, as held in *Coffin v. Ransdell*, 110 Ind. 417, property of a kind used and needed in a business may be taken in exchange for capital stock. But this must be real, and not a sham transaction. As also said by Judge Mitchell in that case: "That subscriptions to the capital stock of a corporation are required to be made in good faith, cannot be doubted. Simulated subscriptions by persons who have neither the ability or purpose to pay, and arrangements between the subscribers and the agents or promoters of a cor-

poration, that subscriptions shall be merely colorable, are a fraud upon the law. This much was decided in the recent case of *Holman v. State, ex rel.*, 105 Ind. 569.

"The legislative purpose in making provision for corporate organizations was, that subscriptions to the capital stock should constitute a fund, or capital, with which to purchase property necessary for the corporate business, and to enable the corporation to engage in and carry out the purpose of its organization. It is upon the faith of its capital stock, either paid in and invested in available property and corporate assets, or to be paid in, that credit may be extended to the corporation. Having paid, or agreed to pay, their subscriptions for stock, is the consideration upon which the several corporators enjoy exemption from personal liability for corporate debts, except as such liability may be imposed by statute.

"It follows necessarily that unpaid subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of creditors; and it follows also, that the officers of the corporation, who are trustees in respect to its property and funds, cannot purposely and fraudulently waste or dissipate the corporate assets, nor can they defeat or impair the trust, by accepting merely simulated or fictitious payment of stock subscriptions, or by any other device short of an actual payment of that which is in good faith taken as an equivalent for the stock. * * * Any arrangement, therefore, between a stockholder and the officers or agents of a corporation, by which paid-up shares of stock are issued upon merely simulated or nominal payment, whether such payment be made in money or property, is regarded, as between the stockholders and the creditors of the corporation, as a

Clow *et al.* v. Brown *et al.*

sham, and hence no payment at all. Such payments, like simulated subscriptions, are an evasion of the law, and are therefore fraudulent and void."

In *Gates v. Tippecanoe Stone Co.* (Ohio), 48 N. E. 285, the supreme court of Ohio, while holding that "subscriptions to the stock of a corporation are *prima facie* payable in money," and that "neither the constitutional provision on the subject of corporate dues [similar to Art. 11, section 14, of our constitution], nor the statutes of the state, contemplate any other mode for their payment;" yet admits that payment for such stock may be made in specific property, provided only the parties to the transaction deal with each other at arm's length and in good faith, and provided other stockholders and creditors do not suffer. But good faith between the immediate parties to such a contract is not of itself sufficient to prevent the transfers of stock from becoming a fraud upon innocent third parties. The fact that the corporation is held out to the world as having capital stock paid in to an amount greatly in excess of the true amount paid, is a palpable fraud upon all who deal with the corporation in ignorance of the real situation.

In the case before us, as we have seen, no payment whatever was made on the \$197,000.00 capital stock. The works were wholly built on borrowed money, and for much less than the proceeds of the bonds issued therefor. The stock passed to the contractors as a mere gratuity. More than this, the fifth paragraph of the complaint shows that in the contract with Comegys and Lewis an understanding was had by which \$40,000.00 of the stock was divided between the appellees Brown and Pierce, while Martindale received \$6,000.00 in cash. By no process of reasoning can it be shown that by such a scheme the directors could rightfully come into possession of so called

"paid-up stock" without in fact paying anything for it. Even, therefore, if the transfer of stock to the contractors could by any means be defended, that to the directors themselves, through the contractors, must remain wholly indefensible. Instead of providing for thus indirectly giving stock to themselves as paid-up, the directors might as well have taken possession of a part of the stock in the first place, and named it "paid-up capital," and then have turned over the remainder to the contractors, and given it the same name. That was the end reached by the roundabout proceeding, all the steps of which were, in effect, but parts of a single transaction. No one would say that the directors might vote themselves stock without paying for it; and what might not be done directly the law will not permit to be done indirectly. Yet, by this indirect, quite the same as by the most direct, transfer, the appellees came into possession of so called "paid-up stock," without having paid anything for it. While holding and voting this sham stock, these directors, without ever having contributed anything to the capital of the company, participated in the \$5,000.00 yearly rental paid to the company by the city. They did more. By obtaining material on credit from appellants, they extended the works, thus receiving additional income, and then suffered appellants' property to be sold in part payment of the previous bonded indebtedness of the company. This was doing business without any actual capital, and, at the same time, holding out to the world \$200,000.00 of sham stock as fully paid-up, thereby inducing confiding third parties to give credit to the wholly insolvent company. The series of transactions, from beginning to end, was a fraud upon the corporate laws of the State. There can be no doubt that the complaint shows a good cause of action. *Clow v. Brown, supra.*

Clow *et al.* v. Brown *et al.*

The appellees knew that the company was hopelessly insolvent, made so by their own act in the sale of the \$150,000.00 bonds, issued, not on any property then owned by the company, for it had none, but on property thereafter to be acquired by the sale of the bonds. They knew that every item of company assets was buried beyond redemption under the mortgage securing the bonds. They knew also that the \$200,000.00 shares of professedly paid-up capital stock were utterly worthless, not a cent having been received from their sale. And yet, knowing all this, they proceeded deliberately to purchase upwards of \$4,000.00 worth of material on the credit of the rotten concern. Such a taking of property under the forms of law ought not to be tolerated by any court.

Appellees, as we have seen, failed to make and publish the annual report required by section 5071, Burns' R. S. 1894 (3863, R. S. 1881). For this violation of the statute no excuse is offered. Had the report been made, showing the absolute insolvency of the company, it can hardly be doubted that no one would have extended credit to the corporation, and appellants would not have suffered the loss of their material. As the capital stock was never paid for, as required by section 5060, Burns' R. S. 1894 (3859, R. S. 1881), it is clear that there could not be a certificate of such payment filed in the office of the clerk of the circuit court, as required by section 5062, Burns' R. S. 1894 (3861, R. S. 1881). Counsel for appellees however say in their brief that the court will presume that such certificate was filed "*stating the amount of the capital so fixed and paid in and the manner in which the same has been paid in.*" But it is not true that such is the certificate required by said section of the statute. The certificate required is one "*stating the amount of the*

Clow et al. v. Brown et al.

capital so fixed and paid in," and nothing as to any "manner" of payment. So, if there were a notice filed showing that the capital stock had been turned over to the contractors and two of the directors as paid-up stock, that would not be the certificate required by law, and the one which appellants, as well as the court, might presume had been filed. The certificate should be one stating simply that the capital stock had been paid in. But the complaint shows that the stock never was paid in and consequently that the certificate required by law could never have been filed.

Section 5076, Burns' R. S. 1894 (3868, R. S. 1881), reads: "If any company organized and established under the authority of this act, and of the act to which this is supplementary, shall violate any of the provisions thereof, and shall thereby become insolvent, the directors ordering or assenting to such violation shall jointly and severally be liable, in an action founded on said acts, for all debts contracted after such violation as aforesaid." Under this section, and by reason of the facts alleged in the complaint, the appellees are clearly liable for the debt contracted in favor of appellants. The insolvency of the company is the undoubted result of violations of the statutes in question, ordered and assented to by appellees, as directors of the company. The judgment is reversed, with instructions to overrule the demurrers to the complaint, and to each paragraph thereof, and for further proceedings not inconsistent with this opinion.

McCabe, J., took no part in the decision of this case.

ON PETITION FOR REHEARING.

HOWARD, C. J.—The learned counsel for appellees do not question the correctness of the conclusions

Clow et al. v. Brown et al.

reached by the court as to the sufficiency of the first, third, fifth, and sixth paragraphs of the complaint; but they say that, as to the fourth paragraph the opinion is erroneous. This contention is undoubtedly the result of a misapprehension of the scope and meaning of one of the concluding paragraphs of the opinion, to wit: "The insolvency of the company is the undoubted result of violations of the statute in question, ordered and assented to by appellees as directors of the company." Counsel do not deny that this statement is correct, in so far as it applies to the facts stated in all the paragraphs of the complaint except the fourth. The sufficiency of the fourth paragraph, however, was considered by itself, inasmuch as that paragraph is based upon sections 5060, 5062, 5071, 5073, Burns' R. S. 1894 (3859, 3861, 3863, 3865, R. S. 1881), which relate to payment of stock and publication of financial condition of company. Under these sections of the statute, the fourth paragraph of the complaint states a good cause of action. By the last of these sections the officers are made liable "if they shall fail to give such notice or make such report, and any person or persons shall be misled or deceived by such false report or certificate or on account of such failure to make such report, and damaged thereby." The fourth paragraph of the complaint alleges the insolvency of the company, and the failure of appellees to publish the notice required, and that appellants were "misled and deceived by such failure to publish such notice," and were damaged thereby in the manner stated. While it is true that the insolvency of the company was caused by violations of the statutes on the part of appellees, as set out in the first, third, fifth, and sixth paragraphs of the complaint, for which appellees incurred the liability prescribed in section 5076, Burns' R. S. 1894 (3868, R. S. 1881), yet that does not

Baker v. Cravens.

relieve them of liability, also, for failure to make the publication prescribed in section 5073, Burns' R. S. 1894 (3865, R. S. 1881), as set out in the fourth paragraph of the complaint. Of course the failure to publish the report was not a cause of the insolvency of the company, but it was a cause of damage to appellants, for which they had a right to recover. That the fourth paragraph of complaint may not have been sufficiently definite, as claimed by counsel, on authority of *Niles v. Dodge*, 70 Ind. 147, was not a reason for sustaining the demurrer, whether it might have justified a motion to make more specific or not. Whether it was sufficiently specific, we need not and do not decide. *Rodgers v. Baltimore, etc., R. W. Co.*, *post*, 398.

Petition overruled.

BAKER v. CRAVENS.

[No. 18,516. Filed April 1, 1898.]

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APPEAL AND ERROR.—Exceptions.—Where exceptions to conclusions of law are joint, no question is presented if either conclusion is correct. *p. 201.*

WILLS.—Probate.—Clerical Error.—Where the probate order book containing the record of the probate of a will refers to the testatrix as Mary Baker, but the will and the proof made a part of the record identifies the will as that of Martha V. Baker, and discloses the error of the clerk in making the entry, such error will not defeat the probate thereof, nor cast a cloud on the title to the real estate devised. *p. 201.*

SAME.—Probate.—Section 2754, Burns' R. S. 1894, *et seq.*, does not require a specific finding to be entered of record of each of the elements of proof in probating a will, where the proof itself is entered of record. *pp. 201, 202.*

APPEAL AND ERROR.—Wills.—Probate.—Appellant cannot complain of a judgment of the court denying his petition to cancel the record probating a will and to be permitted to make due probate thereof, where such judgment was based upon a finding that the will was properly probated. *p. 202.*

Baker v. Cravens.

From the Grant Circuit Court. *Affirmed.*

H. M. Elliott and *G. M. Elliott*, for appellant.

Austin De Wolf, for appellee.

HACKNEY, J.—The appellant, by petition, in the nature of a proceeding in equity, sought to cancel the record purporting to probate the last will of Martha V. Baker, and to be permitted to make due probate of said will. The theory of the petition was that the record was incomplete, showing no perfect probate of said will and constituting doubt as to the appellant's title by devise under said will.

The questions presented as error arise upon exceptions to conclusions of law drawn from facts specially found. The facts material were, in substance, as follows: Martha V. Baker, wife of the appellant, died testate December 1, 1892, leaving the appellant, her husband, and the appellee, her daughter, as her only legatees, devisees, and heirs at law. That by her last will she gave all of her property, real and personal, excepting five dollars, to the appellant, and said sum of five dollars she gave to her said daughter. It is found that the appellant, with one of the witnesses of said will, presented the same to the lower court for probate, and before said clerk made the usual affidavit in proof of probate, whereupon the said will was presented for probate to the Grant Circuit Court, which court made decision and entry in its probate order book as follows: "The last will and testament of *Mary Baker*, deceased, is now filed and presented in open court; and comes also Archibald Cranston one of the subscribing witnesses to the execution thereof by said decedent, and, being duly sworn, on his oath makes due proof thereof in the following words to wit: (Here insert.) Thereupon it is decreed by the court that said last will and testament has been

Baker v. Cravens.

duly admitted to probate and record of said county, which will and the clerk's certificate of probate are in the following words to wit: (Here insert.)" The will, the proof, and the certificate were recorded, and are set out in the transcript. The will and the proof refer to the testatrix as "Martha V. Baker, late of said county, deceased December 1st, 1892;" that she was of "full age" at the time of the execution of the will, etc. There are a number of findings having reference to a suit by the appellee to contest the will and the final dismissal thereof, but they have no influence upon the questions for decision by this court. The court's conclusions of law were "(1) that said will was duly admitted to probate; (2) that said petition to set aside said probate was not filed within the time limited by law for contesting said will; (3) that the prayer of said petitioner ought not be granted."

The exceptions to the conclusions were joint, and if • either conclusion is correct, the exceptions should fail.

The appellant seems to doubt the sufficiency of the probate because the record thereof referred to the last will of Mary Baker, but the will and the proof, made a part of the record, very clearly identifies the will as that of Martha V. Baker, and disclosed the trivial error of the clerk in drafting the entry. Such errors are not substantial, and could not defeat probate, or cast a cloud upon the appellant's title under the will.

It is further urged that the proof was insufficient in showing jurisdiction in the Grant Circuit Court. We observe no substantial objection to the proof in its statement that the testatrix died a resident of Grant county, as required by section 2750, Burns' R. S. 1894.

Many of the objections urged are as to the failure of the record of probate to disclose that evidence other than said affidavit was heard, or that oral exam-

Baker v. Cravens.

ination of witnesses was made. We think the entry of probate broad enough to include a finding of a full hearing of oral and documentary proof. However, we have no doubt that the statutory requirement that the proof shall be entered of record contemplated that ordinarily proof should be made by affidavit. Where such affidavit is recorded, it may be fairly presumed that the court acted upon it.

Many objections are urged against the record of probate because of its failure to find the sanity, age, place of death, etc., of the testatrix, and that the will was presented for probate by some one interested in the estate. The statute, section 2754, Burns' R. S. 1894, *et seq.*, seems not to contemplate the specific finding, entered of record, of each of the elements of proof in making probate. The proof itself, being entered of record, remains to disclose the facts of due execution.

Due execution and proper probate are expressly conceded by the appellee, and, since this proceeding is effective only as to her, the appellant secured by the conclusion and judgment of proper probate all that he was entitled to, and has no substantial merit in his appeal.

Much is said of the answers filed by the appellee in the lower court, and the failure of the court to make findings with reference thereto, and of the fact that contest of the will was not contemplated by this proceeding. All of these questions are conceded in favor of the appellant, and there was no adverse decision. No question is fairly before this court beyond that of the probate of the will. Upon that question we are impressed that the lower court decided correctly. The judgment is affirmed.

Parsons et al. v. Durand.

PARSONS ET AL. v. DURAND.

[No. 18,275. Filed April 5, 1898.]

INJUNCTION.—Officers.—Title to Office.—Municipal Corporations.—

Injunction is the proper remedy to prevent the intrusion of a claimant to an office occupied by another under claim of right, where the question of title to the office is not involved. *p. 204.*

QUO WARRANTO.—Officers.—A quo warranto proceeding is the proper action to test the right to an office where the title thereto is involved. *p. 204.*

MUNICIPAL CORPORATIONS.—Common Council.—When Acts Not Legislative.—The determination of the legal rights of adverse claimants to an office and the ejection of the incumbent thereof are not legislative functions of a city council, but are acts within the province of the judiciary. *pp. 204, 205.*

From the Miami Circuit Court. *Affirmed.*

Milton Kraus, Bailey & Lawrence, Loveland & Loveland and James F. Stutesman, for appellants.

John Mitchell, Frank D. Butler and Charles A. Cole, for appellee.

HACKNEY, J.—At the May election in the year 1894, Jesse S. Zern was elected to the office of mayor of the city of Peru, and served in said office until the 9th day of May, 1896, when he departed this life. On the evening of May 9, 1896, the appellee, Orson Durand, was chosen to fill the vacancy in said office, and, giving bond and taking the oath of office, entered upon the duties of said office. On the 12th day of May, 1896, the appellant, Charles A. Parsons was chosen to fill said vacancy, and also executed a bond and took the oath of office. Thereupon the appellee sought and obtained a restraining order against the appellant Parsons and his co-appellants, members of the common council and clerk of said city, whereby they were forbidden to recognize Parsons as mayor, or to refuse recognition to Durand as such officer, or to

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Parsons et al. v. Durand.

expunge the order of selection of said Durand. There was much in the pleadings, and there is here considerable discussion, concerning the right of those making the selection of Durand to perform the functions of councilmen. That question related to the time of the beginning of the term of the successors in office of the councilmen participating in the action of May 9, 1896. Successors had been elected on the 5th day of May, 1896; and as to whether their terms should begin immediately upon qualifying, or from and after the 10th day of May, the day of the month on which the terms of their predecessors began, depending upon a construction of the act of February 11, 1893, known as the "McHugh Law" (Acts 1893, p. 50). By the decision of the circuit court the appellants were enjoined from interfering with the exercise, by the appellee, of the duties of the office until the title thereto should be determined by proper legal proceedings.

Counsel for the appellants insist that *quo warranto*, and not injunction, was the proper remedy, and that injunction against the appellants is an unauthorized interference by the judiciary with the exercise of legislative functions. If the decision of the lower court had involved the question of the title to the office of mayor, the first of the propositions stated would be correct, as we held in the recent case of *Carmel, etc., Co. v. Small, post*, 427. The decision involved no such question, but expressly recognized the unsettled question of title, and stayed the intrusion of one claimant into the office against one occupying the office upon a claim of right. In such case injunction is the proper remedy. *City of Huntington v. Cast*, 149 Ind. 255, and cases there cited. See, also, *Brady v. Sweetland*, 13 Kan. 41.

The second proposition stated, we may answer by saying that the common council of a city in taking

Davis v. Mendenhall, Trustee.

the law into its own hands, deciding upon the legal rights of adverse claimants to an office, and enforcing its decision by a short method of ejecting the incumbent is not in the performance of a legislative function, but is trespassing upon the territory of the judiciary. The selection of Mr. Parsons, even if it were a legislative function, was not restrained nor sought to be restrained.

Nor do we observe any force in the contention that it did not appear that Durand was eligible to hold the office. That question has its proper place in a legal proceeding to contest the right to the office, and does not arise in a suit to restrain the appellants from ousting him without legal process. No error appearing in the record, the judgment is affirmed.

DAVIS v. MENDENHALL, TRUSTEE.

[No. 18,872. Filed April 5, 1898.]

SCHOOLS AND SCHOOL DISTRICTS.—Abandonment of School.—Removal of School Site.—Township Trustee.—Section 5920a, Burns' R. S. 1894 (Acts 1893, p. 17), limiting the power of township trustees in the removal of school buildings, and changing the sites thereof, does not apply to the action of a township trustee in abandoning or discontinuing a school in a certain district in the township on account of the small attendance of pupils.

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From the Howard Circuit Court. *Affirmed.*

Dallas S. Holman and Claybaugh & Claybaugh, for appellant.

John C. Farber, for appellee.

JORDAN, J.—Appellant applied to the Clinton Circuit Court to secure a writ of injunction against the appellee, trustee of the Forest school township, in Clinton county, Indiana, to prevent him from abandoning and discontinuing a public school in district number three in that township, and from changing

Davis v. Mendenhall, Trustees.

the site of a schoolhouse wherein the school had been previously conducted.

The complaint, among other things, alleged substantially that the plaintiff was a resident of said school district number three, and the father of eight children, all of whom were members of his family, and between the ages of six and twenty-one years, and entitled to the privilege of the public schools of that district; that a public school, for over twenty years, had been conducted in a schoolhouse situated in the said district, which schoolhouse was amply provided and furnished for school purposes; that the defendant was threatening and endeavoring to change the present site of the school to the unincorporated town of Forest, situated in another and different district in the township, and was about to abandon, abolish, and discontinue in the future a public school in said district number three, and would thereby deprive the plaintiff, and others of said district of school privileges at said site, which they had previously enjoyed for a period of over twenty years. All of which, it is averred, the defendant is endeavoring to carry into effect against the wishes of the school patrons of the district, and in utter disregard of the law, etc.

A demurrer to the complaint was overruled. On motion the case was venued to the Howard Circuit Court, wherein appellee filed an answer in two paragraphs, the first, a general denial. The second paragraph was verified by the oath of the appellee, and the material facts therein averred may be summarized as follows: The town of Forest is unincorporated, and is situated about midway north and south, in said Forest township, and is located in school district number one. The defendant had established a graded school in the town of Forest, by building a large and commodious schoolhouse, containing four large

Davis v. Mendenhall, Trustee.

rooms, which were graded for school purposes, and would conveniently accommodate one hundred and seventy-five pupils. The average daily attendance in said school district number one at the graded school in the town of Forest for the year prior to the beginning of this action was one hundred and twenty-four, and this school is amply equipped for educational purposes, and is taught by competent teachers, and is conveniently located for the attendance of pupils in all directions therefrom. North of a line drawn east and west through the township of Forest there are eleven and one-half sections of land, and only two school districts therein, number eight and number ten. Number eight is located three miles north, and number ten three miles northwest, from the town of Forest. District number eight has a daily attendance of thirty-eight pupils, and number ten an average attendance of thirty-three. Some of the pupils attending in said district live more than two miles from the schoolhouses therein. South of said line above mentioned, there are fifteen sections of land and six school districts, namely, the second, third, fourth, fifth, sixth, and seventh, each with a schoolhouse therein; besides the school district number one with the schoolhouse in the town of Forest. The schoolhouse in district number two is located two miles south and a quarter of a mile west of said graded school, and the schoolhouse in district number four is located three and three-quarters miles southeast of said graded schoolhouse. The schoolhouse in district number five is located one mile and three-quarters east from said graded schoolhouse, and the said schoolhouse referred to in plaintiff's complaint, situated in school district number three, is located only a mile and a quarter south from said graded school, and is nearer to the town of Forest than is any other schoolhouse in said

Davis v. Mendenhall, Trustee.

township. School number two had a daily average attendance of fourteen, number four a daily average attendance of thirteen, number five a daily average attendance of thirty-three and schoolhouse number three, in controversy, a daily average attendance of only sixteen pupils during the past year. Schools number two, three, and four combined had a daily average attendance of only forty-three pupils during the past year. The children who have hitherto attended school in district number three can conveniently attend school at the town of Forest, or can attend the schools in other districts adjacent to district number three, without being required to travel a greater distance than many of the other children in said township are required to go to reach their respective schools. There are more schools in Forest township south of the town of Forest than are necessary to accommodate the children in that part of the township, and the schools in the township are "inequitably" distributed. By the abandonment of the school in district number three no child will be situated an unreasonable distance from school. On account of the large number of schools in said township, it is averred that the school term in each year is shortened, and the children of the township are deprived of the benefits of a reasonable term of school. The defendant, as trustee of said township, believing it to be for the best interests of the schools thereof, to abandon the holding of school in district number three, and desiring to do what he believed would be for the interest and benefit of all the children in the township of school age, and the exercise of the authority and discretion vested in him by law, did, prior to the beginning of this action, by an order, duly entered of record, abandon school district number three, and directed that the pupils thereof heretofore enumer-

Davis v. Mendenhall, Trustee.

ated and allotted to said school district number three be allowed to attend any of the other schools in Forest township which their respective parents or guardians might select. A portion of the former patrons of said school district number three elected to be enumerated in other districts. Defendant notified the plaintiff, and others having children entitled to attend school in district number three, of his action in abolishing and discontinuing the said school therein, and offered to make the proper transfer to any of the other schools of the township as they might designate, without any expense to them. Plaintiff refused to designate any school other than the one in district number three for his children to attend. All the schools of districts two, four, and five, in said township, and south of said line above mentioned, are good schools, and are taught by competent teachers and afford good and sufficient school accommodations for all the pupils heretofore attending in school district number three, and the schoolhouses therein, and also in districts number one, two, four, and five were so located as to be convenient to children residing in school district number three. It is further alleged that it is not just to the taxpayers and school patrons of Forest township to maintain ten schools south of the line heretofore mentioned, and only two schools north of said line, and the expense of maintaining and teaching the school in said district number three, if applied and apportioned among the other schools in said township, will enable the defendant to maintain all of the schools in the township for a longer period. He has made ample preparation to accommodate all the school children of district number three at said graded school in the town of Forest, and at schools number two, four, and five, and the attend-

Davis v. Mendenhall, Trustee.

ance of children of district number three upon either or any of said schools will not seriously inconvenience any of them. In discontinuing the school in district number three, of which the plaintiff complains, it is alleged that he acted in good faith, and was induced to do so by the belief and conviction that it was to the best interest of said township; that said decision or action was so rendered or taken by the defendant as school trustee of said township, and the record made to that effect, and notice thereof given by the defendant to the plaintiff and all other persons having children of school age in said district, before the filing of the complaint in this case, and said order so made by him has not been appealed from or revoked, but is still in full force and effect. The defendant did not, and does not now, and never has contemplated or ordered the removal of the schoolhouse in said district to any other site, and has never threatened and does not intend to move said school building from its present site in said school district. A demurrer to this second paragraph of answer was overruled, and appellant refusing to further plead in the action, the court dissolved the temporary restraining order previously issued, and rendered judgment in favor of the appellee for costs, and these rulings of the court are assigned as error.

Counsel for appellant in their brief say that the only question involved in this cause is the right of the appellee, as trustee of the township in his discretion, "to abandon or dissolve a school or remove a school site" since the passage of the act of 1893 entitled an act "to limit the power of township trustees in the removal of school buildings and changing the site of said buildings," etc. Acts 1893, p. 17, section 5920a, Burns' R. S. 1894.

It is insisted that under the provisions of this stat-

Davis v. Mendenhall, Trustee.

ute all discretionary power lodged in the township trustees by former laws in respect to the abandonment or discontinuance of a public school or the removal or change of school buildings or school sites has been abrogated, and, it is claimed that this, in effect, is the holding in *Kessler, Tr., v. State, ex rel.*, 146 Ind. 221. The facts disclosed by the second paragraph of answer show that what appellee was about to do, or rather, had done, did not consist in changing the site of the schoolhouse in district number three, nor in removing the schoolhouse thereon to a new location, but that he had simply decided (which decision had been entered of record) to abandon or discontinue for the time being, at least, the school in the district in controversy because of the small attendance of pupils at said school, who, as it seems, could be accommodated equally as well or better at other schools of convenient access. It appears from the averments of the answer that appellee's action in the premises would conduce to economy, and to the interest of the school affairs of his township. It is further shown that he notified appellant and other school patrons of district number three of his decision in the matter before the commencement of this action, which was instituted on April 28, 1897, and offered to give them the advantages and privileges of any of the other schools conveniently near that they or appellant might select; but it seems that the latter declined the offer, but insisted on sending his children to the school previously mentioned in district number three. The facts set up in the answer disclose that appellee as the trustee of the township had, under the circumstances, in good faith, within the scope of his authority, exercised a discretionary power with which he was invested under the law as it existed at least prior to the passage of the act of 1893, consequently he was

Davis v. Mendenhall, Trustee.

not subject to judicial control in the exercise of such discretion. *Tufts, Tr., v. State, ex rel.*, 119 Ind. 232, and cases there cited.

The facts show that there was no attempt on the part of the appellee to change the present site of the schoolhouse in the district in question, nor to remove said building to some other point, consequently his acts in the matter were not in violation of the provisions of the law of 1893, section 5920a, *supra*, but were controlled by the law as it existed prior to the enactment of that statute. *State, ex rel., v. Wilson, Tr.*, 149 Ind. 253. In this case the act of 1893 was construed, and we held, in effect, that it did not interfere with the power of a township trustee, in good faith to abolish a school district, or to discontinue a school therein. This court, in speaking in respect to that act, said: "It is clear from an examination of the provisions of the act cited, that it only applied when it is proposed to change the site of a schoolhouse from one point to another in the same school district. In such case the change of site can only be made by petition to the county superintendent, as provided in said act. *Kessler, Tr., v. State, ex rel.*, 146 Ind. 221. Said act in no way changes the power of the township trustee, as it existed before the passage of said act, to redistrict his township for school purposes, and to abolish school districts, when no new schoolhouses are built, or the sites of those already existing in districts not abolished, are not changed. If it should appear, however, that the redistricting for school purposes or the abolishment of a school district was for the purpose of evading the provisions of the act of 1893, in regard to changing sites of schoolhouses, the same would be invalid and of no effect."

This decision, under the facts as set up in the answer on which the judgment in the case at bar rests,

McFadden v. Owens et al.

is controlling upon the question herein presented, and the answer must be held sufficient as a defense to the action. The verified answer of appellee being sufficient, there was no error in overruling the demurrer; and, on appellee's refusal to further plead in the cause, the action of the lower court in dissolving the restraining order, and in rendering the judgment in favor of the appellee was proper, and its judgment is therefore affirmed.

McFADDEN v. OWENS ET AL.

[No. 18,568. Filed April 5, 1898.]

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APPEAL AND ERROR.—*Special Bill of Exceptions.—How Made Part of Record.*—A special bill of exceptions must be presented to the trial judge within the time given therefor in order to become a part of the record on appeal. p. 214.

SAME.—*Conclusions of Law.—Exceptions.*—The proper way to save for review the question of the action of the court in overruling a motion to set aside its conclusions of law, is by exception, and bringing such motion into the record by bill of exceptions. p. 214.

EVIDENCE.—*Longhand Manuscript.—When Not in Record.—Appeal and Error.*—The longhand manuscript of the evidence is not properly in the record where it is not affirmatively shown that it was presented to the judge within the time allowed for the filing of the bill of exceptions, and before the filing thereof. p. 215.

SAME.—*Longhand Manuscript.—Record.—Certificate of Clerk.—Appeal and Error.*—The manuscript of the evidence is not properly certified to this court where no reference is made thereto in the clerk's certificate, nothing being certified but "a true and correct transcript of all the proceedings." pp. 215, 216.

From the Shelby Circuit Court. *Affirmed.*

Wray & Campbell and J. B. McFadden, for appellant.

Alonzo Blair and T. B. Adams, for appellees.

HOWARD, C. J.—This was an action brought by appellees against appellants to set aside a sale of real estate; also, to declare a judgment satisfied, and for

McFadden v. Owens et al.

damages. There was a special finding of facts, with conclusions of law, and judgment in favor of appellees.

It is first assigned as error that the court sustained appellees' motion for leave to amend their complaint. The record shows that ten days from the 13th day of January, 1896, were given appellant within which to prepare and tender his bill of exceptions to the ruling of the court on this motion. The certificate of the judge to the bill as filed shows that the same was not presented to him until the 24th day of January, 1896, being beyond the time given. This bill of exceptions is, therefore, not a part of the record. But appellant says that the ruling complained of was also made a reason in the motion for a new trial, and hence that the time given for filing the general bill of exceptions was applicable to the ruling here complained of. This argument might be good if the general bill of exceptions embraced the motion and the ruling thereon, which it does not; but the argument is not good to show that the special bill itself is in the record. To make this bill a part of the record, it was absolutely necessary that it should have been tendered within the time given.

The second error assigned is that the court overruled appellant's motion to set aside its conclusions of law on the facts found, and for conclusions and judgment in favor of the appellant. The proper way to have raised the question here intended would have been simply to except to the court's conclusions of law. But, if the procedure were correct, the motion, in order to save the question for review, should have been brought into the record by bill of exceptions, which was not done.

It is finally assigned as error, that the court overruled appellant's motion for a new trial. The consid-

McFadden v. Owens et al.

eration of this ruling would require an examination of the evidence, which, however, does not seem to be in the record. Sixty days from the 18th day of March, 1896, were given the appellant within which to prepare and tender his general bill of exceptions containing the evidence. The certificate of the judge shows that the bill was presented to him on the 1st day of May, 1896; and a record entry shows that the longhand manuscript of the evidence was not filed in the clerk's office until the 15th day of May, 1896. It is shown that on the 25th day of June, 1896, the judge filed in the clerk's office the bill of exceptions, which then contained the longhand manuscript of the evidence. When this longhand manuscript was incorporated in the bill is not anywhere shown. Counsel for appellant argue that on the day on which the manuscript was filed, or on the next day, which would have been within the sixty days given, the manuscript might have been incorporated in the bill, and the bill, as so completed, might then have been again tendered to the judge. It is true this might have been done, but there is nothing to show that it was done. There must be an affirmative showing that the whole bill was tendered to the judge within the time given. *Hamrick v. Loring*, 147 Ind. 229; *Citizens Street R. R. Co. v. Sutton*, 148 Ind. 169. Without the longhand manuscript the bill as presented was incomplete; and if only one part of it was presented within the time fixed no part could be considered. *Wysor v. Johnson*, 130 Ind. 270. In addition, it is made the duty of the clerk, on request, "to certify the said original manuscript of evidence, * * * instead of a transcript thereof." Acts 1873, p. 194, section 1476, R. S. 1894 (1410, R. S. 1881). The clerk has, however, certified nothing but "a true and correct transcript of all the proceedings," etc., wholly

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

omitting any reference to the original longhand manuscript. The manuscript of the evidence was, therefore, not certified to this court. It may not be out of place to remark that even if the questions suggested were properly raised by the record, no error would be disclosed. The decree of the court was unquestionably correct. Judgment affirmed.

THE STATE BOARD OF TAX COMMISSIONERS ET AL. v.
HOLLIDAY ET AL.

[No. 18,808. Filed Jan. 12, 1898. Rehearing denied April 5, 1898.]

TAXATION.—*Legislature Selects Subjects for Taxation.*—*Property Not Taxable.*—It is a legislative power to select the subjects for taxation, and the constitution imposes the duty and limitation upon the legislature of providing by law regulations or methods for a just valuation of all property, both real and personal, and where the legislature does not prescribe such regulation as to any particular species of property, such property cannot be taxed.

STATUTORY CONSTRUCTION.—*Intention of Legislature.*—In order to ascertain the intention of the legislature the court should look to the letter of the statute, to it as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief to be remedied, to other statutes, to the rules of the common law, and to the condition of affairs when the statute was enacted.

TAXATION.—*Insurance Policies Not Taxable.*—Paid up non-forfeitable and partly paid up life insurance policies are not subject to taxation, as there is no statute providing any regulation for, or any manner of assessing or valuing such policies.

From the Marion Circuit Court. *Affirmed.*

W. A. Ketcham, Attorney-General, Smiley N. Chambers, Samuel O. Pickens, Charles W. Moores and Silas M. Shepard, for appellants.

Albert J. Beveridge, A. G. Smith, C. A. Korbly and John A. Finch, for appellees.

MCCABE, J.—This suit was brought by appellees for themselves and on behalf of many other persons, citizens of Indiana, similarly situated, who, it is alleged, are too numerous to be brought before the court, the

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154	643
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157	370
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158	132
158	646
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159	184
159	185
159	190
159	191
159	196
159	390
160	216
161	474
161	620
150	216
163	167
150	216
166	398
167	63
167	64
150	216
171	707

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

object of which was to enjoin the listing and valuing of life insurance policies for taxation, held by the appellees. The defendants filed an answer of general denial only, and the issues thus formed were tried by the court resulting in a finding for the plaintiffs, and upon such finding the court rendered judgment and decree perpetually enjoining the defendants from listing and causing to be listed for taxation paid-up life insurance policies and nonforfeitable and partly paid-up life insurance policies held by appellees, and by each and all of those for whom this suit is brought and prosecuted; the defendants' motion for a new trial having been overruled. From this judgment the defendants have appealed, and assign for error that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the defendants' motion for a new trial. The other defendants named in the complaint and included in the decree, in addition to the State Board of Tax Commissioners, are the auditor and assessor of Marion county, and the assessors of the several townships of said county. After stating that the appellees hold each a life insurance policy issued by the appellee The New York Life Insurance Co., a minute description of the terms and conditions of the policies so issued by said company is given. Among other things, it is alleged that the New York Life Insurance Company is a corporation organized under the laws of the State of New York, and has been engaged in the life insurance business ever since its organization, and has been engaged for forty years in such business in Indiana. It is also averred that the State Board of Tax Commissioners have caused to be printed in the tax assessment lists to be used by the township assessors in the several townships of this State, under the schedule lists of personal property known as "Credits," items

The State Board of Tax Commissioners et al. v. Holliday et al.

7 and 8, to be answered by the taxpayers holding life insurance policies, as follows, to wit: "(7) Number of paid-up life insurance policies and their value ——" "(8) Number of Non-forfeitable and partly paid up life insurance policies and their value ——" It is alleged that the said board is threatening and is about to instruct all assessors in the State to assess and value for taxation all such policies, and is about to cause the same to be done, and about to cause criminal prosecutions to be instituted against all refusing to list and value such policies. If the complaint is sufficient, the evidence is also amply sufficient to support the finding; and, on the other hand, if the complaint does not state facts sufficient to constitute a cause of action, the evidence will not support the finding.

The cardinal question lying at the bottom of the whole controversy is whether life insurance policies are legally subject to taxation in this State. The extreme length to which the argument of that question has been extended has made it needlessly burdensome. It is conceded by the appellants that no insurance policies of any description have ever been taxed in this State heretofore. Section 3 of the tax law of 1891 provides that "all property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation." Section 8410, Burns' R. S. 1894. In section 50 of that act, specifying what shall be embraced in the schedule, the last specification is "all other goods, chattels and personal property, not heretofore specifically mentioned, and their value, except property specifically exempt from taxation." These provisions are relied on by the appellants' counsel as including life insurance policies, if they are personal property.

The Attorney-General, on behalf of the State, says:

"Our contention is that such policies are claims and demands in favor of the policy holder against the company issuing such policy, and form the basis of a right of action between them; that they are personal property. It is not necessary for us to cite authorities defining personal property, for the statutes of Indiana have done that, and the definition is in point in this contention." And we are referred to section 1309, Burns' R. S. 1894 (1285, R. S. 1881), containing this provision: "The phrase 'personal property' includes goods, chattels, evidences of debt, and things in action." That definition of personal property, however, by the express terms of the section, which is a section of the code of civil procedure, is made to apply only in the construction of that code. And appellants' learned counsel further extend this line of argument by quoting from *Hutson, Admr., v. Merrifield, Admr.*, 51 Ind., at p. 29, that: "A policy of insurance is a chose in action governed by the same principles applicable to other agreements involving pecuniary obligations." There are many decisions by this court and other courts to the same effect. And hence it is argued that life insurance policies are personal property within the meaning of the tax law of 1891 and the constitution, and therefore the action of the State Board of Tax Commissioners was justified by law. It is admitted, however, that there is no statute authorizing the taxation of life insurance policies by name, and that they were added to the assessment sheets, and inserted in the schedule by the State Board of Tax Commissioners in manner and form as alleged in the complaint. The power of taxation is a sovereign power and belongs exclusively to the legislative department of the government. The power of the legislature over the subject of taxation admits no limitation except where specially imposed

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

by the constitution itself. Black on Constitutional Law (2nd ed.), 375; Cooley on Taxation, p. 4.

Appellants' learned counsel also contend that section 1 of article 10 of the State constitution requires the taxing officers to assess for taxation life insurance policies, they being property within the meaning of the tax law and that provision of the constitution. It reads as follows: "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law."

This constitutional provision does not confer the power of taxation, because that power being sovereign, it is inherent in the legislature. But the provision is rather a limitation upon the power to tax. It is, therefore, a legislative power to select the subjects for taxation, and this constitutional provision imposes the duty and limitation upon the legislature of providing by law *regulations* or *methods* for a just valuation of all property, both real and personal, for taxation. Where the legislature has not exercised this power, no other department of the State government can supply the omission; and where no such regulation has been prescribed by law as to any particular species of property, then such property cannot be taxed. This conclusion may rest either on the inference from such failure to prescribe such regulations that the legislature did not intend to select that particular species of property as a subject for taxation, or regardless of the legislative intent the failure to prescribe such regulations leaves such property unselected as a subject for taxation. *Riley*

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

v. *Western Union Tel. Co.*, 47 Ind. 511; *Senour v. Ruth*, 140 Ind. 318; *Hyland, Auditor, v. Brazil Block Coal Co.*, 128 Ind. 335. The statute must not only provide what property shall be taxed, but it must provide methods for the valuation of such property, and clothe some person, officer, or tribunal with power and authority to assess such valuation; and, if the statute contains no such provisions, it will be insufficient to subject such property to taxation. *Riley v. Western Union Tel. Co.*, *supra*; *Senour v. Ruth*, *supra*. Accordingly it was held by this court in *Pfaff v. Terre Haute, etc., R. R. Co.*, 108 Ind. 144, that real estate belonging to the right of way of the railroad, which had been omitted from the schedule by the State Board of Equalization, could not be placed upon the duplicate by the county auditor as omitted property, for the reason that the statute conferred the power and authority exclusively on such board to value or assess said property for taxation; and that the act of the county auditor in assessing the same was without authority of law, and void. And it is settled in this State that taxes cannot be imposed or collected except in the mode prescribed by law. *State, ex rel., v. Illyes*, 87 Ind. 405; *Hamilton v. Amsden*, 88 Ind. 304. But it is, in effect, contended by the learned counsel for appellants that life insurance policies being personal property the township assessors are clothed with power and authority to assess and value them for taxation by the statute. To this contention the appellees' counsel interpose two objections, namely: 1st. That assuming that such policies are personal property of such a nature as to fall within the literal terms of the tax law above quoted, yet that the legislature has provided no regulations for the valuation of such policies; and in the absence of such regulations the State Board of Tax Commissioners cannot, as appellees

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

contend, usurp the functions of the legislature, and discharge the duties enjoined upon it by the constitution to "prescribe such regulations as shall secure a just valuation of all property." 2nd. That the legislature did not intend to include life insurance policies in the language above quoted, "all property within this State" or the words "all other goods, chattels and personal property," or in section 53, providing the form of the schedule, by the words "credits," "demands and claims."

As to the first objection to appellants' contention, we note that the statute makes annuities and royalties subject to taxation, and provides a regulation for the valuation of them for taxation, thus: "In making the valuation, annuities and royalties shall be valued at their present cash value." In the absence of this regulation annuities would only be taxable on the annual installments that were due and payable, and the bond itself would not be taxable. *State v. Cornell*, 31 N. J. L. 374. There are many other regulations as to the method of valuation of certain classes of property. The difficulty arising out of the absence of any statutory regulation for the just valuation of such property as life insurance policies seems to have been keenly appreciated by the State Board of Tax Commissioners, and so they attempted to supply the omission by the following order: "Instructions to County Assessors. Office of State Board of Tax Commissioners. Indianapolis, Ind., May 19th, 1897. The following tables, based upon the combined experience of actuary's tables, have been prepared for your guidance in arriving at the taxable value of insurance policies. The tables are based upon policies for the sum of \$1,000.00—the computations being made at the universally recognized rate of four per cent. By reference to, and a careful study of the tables and the

explanatory notes following, you will be enabled to, at least, closely approximate the taxable value of all policies you come in contact with. You are instructed that, in the opinion of this board, as well as the law department of the State, all the forms of insurance policies herein given are liable to assessment and taxation at their actual surrender cash value. You are instructed and urged to look closely after all holders of such policies, and see that they are returned for taxation. Vigilance on your part in this, as well as in other matters, will greatly increase the taxable values of the State, and will result in a more equitable distribution of the burdens of the government." And then follows a long list of tables, with instructions and explanations, furnishing regulations for the valuation of life insurance policies, making quite a good sized pamphlet, and at the end it is signed by members of the State Board of Tax Commissioners. The act of 1872 providing for taxation generally, provided that "all real property within this State, and all personal property owned by persons residing in this State, whether it is in or out of this State, and personal property within this State * * * shall be subject to taxation." By the 5th section of that act the terms "personal estate" and "personal property" are made to include, amongst other things, "all bonds or stocks, whether of bodies politic or corporate;" and "the shares of stock of incorporated companies and associations organized under the law of this State or the United States." Acts 1872, p. 57. By the 4th subdivision of section 12 of that act, in relation to the valuation of personal property, provision is made for the valuation of the capital stock of all companies and associations then or thereafter created under the laws of this State, by the State Board of Equalization. Sections 84 and 85

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

of that act provided for the valuation whereby telegraph lines in this State used by any person, company, or corporation should be taxed. The capital stock and tangible property were to be reported to the Auditor of State, and under the regulations therein provided the State Board of Equalization was required to assess the capital stock "in manner hereinafter provided." The State Board of Equalization assessed the capital stock of the Western Union Telegraph Company having telegraph lines in this State. That company sued to enjoin the collection of the tax levied and assessed against its property, resulting in a judgment enjoining the treasurer against the collection of the tax, which judgment, on appeal to this court, was affirmed. *Riley v. Western Union Tel. Co., supra.* It appeared from the complaint in that case that the plaintiff was a foreign corporation, existing under the laws of New York, and not under the law of the State of Indiana. That its capital stock was about \$40,000,000.00. That its property in this State was of the aggregate value of more than \$150,000.00, and it had 8,628 miles of telegraph lines in this State, and that the State Board of Equalization, assuming that \$800,000.00 was the fair proportion for the State of the capital stock of the company, ordered an assessment upon that amount, less the tangible property of the company in this State. It was there said by Worden, J., speaking for the court, that: "If the taxes were assessed without authority of law, there can be no doubt, so far as the law of Indiana is concerned, that an action will lie to enjoin their collection. * * * Can the capital stock of a telegraph company, organized and existing under the laws of another state, and not under any law of this State, and doing business here only on the principle of comity, be taxed to the corporation in this State under

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

any existing law of the State? The question is not one of power, but whether such power, assuming it to exist, has been exercised by the legislature. * * *

But neither section 12 nor 85, nor, indeed, any other section of the statute * * * contains any provision in relation to the manner of assessing the stock of foreign corporations. * * * Thus there would seem to be no provision made for the manner of assessing the stock of foreign corporations; and this would seem to be a pretty strong reason for inferring that the legislature did not intend by sections 84 and 85 to assess the capital stock of foreign telegraph companies. * * * The language of section 84, taken by itself, is broad enough to cover foreign as well as domestic telegraph companies; but as section 85, which authorizes the assessment, refers to some subsequent part of the statute for the manner of the assessment, and as there is no provision whatever in relation to the manner of assessing, by the board of equalization, the capital stock of foreign, but only domestic corporations, we are of opinion that the legislature did not intend by sections 84 and 85, to assess the capital stock of foreign, but only domestic telegraph companies." There is much more ground for claiming that no manner, method, or regulation has been provided for assessing or valuing life insurance policies than that no such regulations had been provided for assessing the capital stock of foreign telegraph companies with lines and property in this State. And yet for the failure to prescribe such regulations in the tax law of 1872 for the assessment of the capital stock of foreign telegraph companies with lines and property in this State, the assessment of the State Board of Equalization was held void by this court in the case we have referred to.

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

And under that statute millions of dollars worth of property of telegraph companies that might have been subjected to taxation by the State of Indiana by proper legislation escaped taxation from the enactment of the tax law of 1872 to the enactment of the law of March 6th, 1893, to provide for the taxation of property of telegraph, express, and sleeping car companies. Buskirk, C. J., concurred in the judgment in the case from which we have just quoted, in a separate opinion, in which he said: "I think the law of March 6, 1893, to provide for the taxation of the stock of the appellee, but failed to provide the necessary machinery to effectuate the purpose proposed. It is very manifest to me that the legislature had no right to impose a tax upon the entire stock of the company, and having failed to provide the proportionate part which should be subject to taxation in this State, the assessment made cannot be sustained."

It is conceded by the appellees that the legislature may, in the exercise of its sovereign power, tax the citizen's interest in a policy of life insurance *ad valorem*. What they contend for is that life insurance policies are of such a nature, and the interest of the person insured, or the beneficiary therein named, is so contingent, so dependent, not only upon the methods and plan of the insurer and his solvency, but upon complicated mathematical calculations to determine the net value of his interest in the reserve fund, that the ordinary methods of listing and valuing property, notes, accounts, shares of stock, and the like, are wholly inadequate to secure a just valuation thereof for taxation. They say the action of the State Board of Tax Commissioners in compiling and publishing tables to be used by township assessors in valuing the interest of holders or beneficiaries of life

insurance policies affords proof that the methods or regulations for valuing property on the schedule by the taxpayer and township assessor are wholly inadequate to value life insurance policies, or the reserve fund value, or the surrender value thereof, for taxation. This contention we think must prevail. But this holding is strictly confined to the case now before us, and can have no application to ordinary personal property to value which no special regulations are necessary, because section 53 of the tax law provides that "The words 'value,' 'cash value,' 'true value,' or 'valuation,' whenever used in this act, shall be held to mean the usual selling price at the place where the property to which such term or terms are applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale." Section 8463, Burns' R. S. 1894. There is no such thing as the usual selling or market price of paid up policies of life insurance, or partly paid up and non-forfeitable life insurance policies at the place where such policies shall be. And there is no such thing as a price paid for such policies at forced or auction sale thereof. There might be such a thing as the price which could be obtained for such policies at private sales. But the language we have quoted evidently refers to classes of property which could be exposed to forced and public sales; and therefore it seems unreasonable to suppose that the language quoted was intended to include life insurance policies. But assuming that the statute means the cash value, and is broad enough to embrace life insurance policies, how is such value to be ascertained without some method or regulation prescribed by law whereby it can be so ascertained. That value depends upon so many conditions

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

and contingencies, such as the financial condition and earnings of the company, a condition a knowledge of which is more than likely not within the reach of the taxing officer or the policy holder, the legal effect of the contract of insurance, and a system of complicated, scientific mathematical calculations, known only to special experts. Certainly if there is any property in all the wide world that calls for and absolutely requires some fixed method or regulation prescribed by law, other than that provided for ordinary and tangible property, by which to secure a just valuation thereof for taxation, none stands more in need of it than life insurance policies.

The second objection urged to appellants' contention is of still greater force. It is that the legislature in the enactment of the present tax law, by the language we have quoted, did not intend to include life insurance policies as subjects of taxation. It may be conceded that it was a duty devolved on the legislature by the constitutional provision quoted to provide for the taxation of all property, both real and personal, except such only for municipal, educational, literary, scientific, religious, or charitable purposes as it might especially exempt by law. Cooley on Taxation (2nd. ed.), 326, says: "It is sometimes a serious question whether a constitutional provision is so far complete and specific in itself as to constitute a sufficient law without assistance from legislation. If it is, it must be considered mandatory and self-executing, and effect must be given to it accordingly. If it is not, it simply lays its mandate upon the legislature, and will fail if that body neglects to pass the necessary laws to carry out the will of the people expressed in it." And the same author in his work on Constitutional Limitations (6th ed.), p. 98, says: "Sometimes the constitution in terms requires

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only a moral force. The legislature ought to obey it, but the right intended to be given is only assured when the legislation is voluntarily enacted. Illustrations may be found in constitutional provisions requiring the legislature to provide by law uniform and just rules for the assessment and collection of taxes. These lie dormant until the legislation is had. They do not displace the laws previously in force, though the purpose may be manifest to do away with it by the legislation required."

According to these principles, and we think they are correct, the constitutional provision quoted is not self-executing, but requires appropriate legislation to carry it into effect. Neither is there any question of the constitutionality of the tax law for failure to carry out in full the constitutional mandate. If the present tax law includes in the words we have quoted life insurance policies as subjects for taxation, then every tax law that ever was enacted under the present constitution has likewise included them, and yet never before was it supposed that they were so included. Such laws have uniformly been construed and acted upon as if they were not intended to select such policies as subjects for taxation, nor has any attempt ever before been made by any of the officers charged with the duty of executing such laws in this State to assess and value for taxation such policies. This is practically conceded by the learned counsel for the appellees. Black on the Interpretation of Laws, p. 221, says: "The executive and administrative officers of the government are bound to give effect to the laws which regulate their duties and define the sphere of their activities, and, in so doing, they must necessarily put their own construction

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

upon such acts. When the courts shall have interpreted the laws, these officers are of course bound to accept and abide by their decisions. But in advance of such judicial construction, they must interpret the statutes for themselves, and to the best of their own abilities. * * * But it is a rule, announced by the Supreme Court of the United States, at an early day, and which has since been followed in numerous cases both in the federal and state courts, that the contemporaneous construction of a statute by the officers who have been called upon to carry it into effect, made the basis of their constant and uniform practice for a long period of time, and generally acquiesced in, and not questioned by any suit brought, or any public or private action instituted, to test and settle the construction in the courts, is entitled to great respect, and if the statute is doubtful or ambiguous such practical construction ought to be accepted as in accordance with the true meaning of the law, unless there are very cogent and persuasive reasons for departing from it." To the same effect is Cooley on Const. Limitations (8th ed.), 51-58. And this court, in *Board, etc., v. Bunting*, 111 Ind. 143, as to whether the board of commissioners had authority to build a jail and sheriff's residence, and of the effect of practical construction, and appropriating the language of the supreme court of Illinois, said: "It has always been equal to positive law." *Bruce v. Schuyler*, 4 Gilm. 221. And adopting the language of the Supreme Court of Massachusetts, said: "We cannot shake a principle which in practice has so long and so extensively prevailed." *Rogers v. Goodwin*, 2 Mass. 475. It was held in that case that, though there was no statute authorizing the county board of commissioners to provide a sheriff's residence, yet, as the statute made it the duty of the county board to pro-

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

vide and maintain a county jail, and enjoins on the sheriff the duty of keeping the jail, and inasmuch as it had always been the custom of boards of county commissioners to make suitable provision for the sheriff's residence, that this custom had given a construction to the law which could not be disregarded, even if there was doubt as to the meaning of the statute. And in the *Board, etc., v. Gwin, Sheriff*, 136 Ind. 562, 22 L. R. A. 402, after stating that the statute requires the county commissioners to erect a court-house and jail and other public buildings, it is said: "But there is no provision, unless in a special act for the removal of county seats, requiring court-houses or other public buildings to be built at the county seat, yet the universal practice, without a single exception, has been that court-houses and other public buildings connected with the courts or the administration of justice have been erected at the county seat. The act of 1875, providing for the various duties of county boards in relation to the construction of court-houses and other public buildings of the county, makes no provision that court-houses are to be built at the county seat. And yet, in view of the long and uniform practical construction given to these statutes, amounting now to positive law, if the board of commissioners were to attempt to erect a court-house at the expense of the county, at any other place than the county seat, such attempt would be illegal and their acts in furtherance thereof would be void and liable to be enjoined." For a period of over forty years the several tax laws that have been in force in this State, all of them practically the same as the present one, as to the question of whether they embraced life insurance policies as subjects for taxation have been uniformly acted upon and construed by the thousands of officers charged with the duty of executing them,

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

and by the tens of thousands of taxpayers during that period, as if they did not embrace or include as subjects for taxation policies of life insurance. During all that time no taxing officer ever attempted to assess them for taxation, and no policy holder ever placed any such property on his schedule or list for taxation; and during all that time we had highly penal statutes in force against the failure to list any property subject to taxation; and during all that time each property owner was required by the several tax laws to take and subscribe an oath substantially that his schedule contained a full list of all his personal property subject to taxation; and yet during all that time no taxpayer was ever prosecuted for perjury in failing to place upon his schedule a life insurance policy, though there were thousands of such policy holders among the taxpayers of Indiana. But we are referred by appellants' learned counsel to the case of *Vicksburg, etc., R. R. Co. v. Dennis*, 116 U. S., at p. 670. That case is not of controlling influence, because the question there was not whether the property, a railroad, had been subjected to taxation by the general taxing laws of Louisiana, but the question was whether the property had been exempted from taxation by the provisions of another statute. And it is agreed by counsel on both sides that there is no question of exemption here, and we think they are correct in such agreement. Such a question can only arise on a statute exempting certain specified classes of property from taxation, which, without such special exemption, would fall within the general purview of the taxing law as subject to taxation. It would be a misapplication of language to talk about exempting property from taxation that had not been subject to taxation. So that the force and effect of practical construction in determining the meaning of

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

a statute are in no way infringed upon by the case referred to by appellants' counsel. Sutherland on Stat. Const., section 218, says: "When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention." To the same effect is Endlich on Int. Statutes, section 365; Potrer's Dwarris on Statutes, 175-180.

In order to ascertain the intention of the legislature the court should look to the letter of the statute, to it as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief to be remedied, to other statutes, to the rules of the common law, and to the condition of affairs when the statute was enacted. *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Middleton v. Greeson*, 106 Ind. 18; *Wasson v. First National Bank*, 107 Ind. 206; *May v. Hoover*, 112 Ind. 455; *Parvin v. Wimberg*, 130 Ind. 561, 15 L. R. A. 775. Sutherland on Stat. Const., section 311, says: "The contemporary and subsequent action of the legislature in reference to the subject-matter has been accepted as controlling evidence of the intention of a particular act." Here for a period of over forty years numerous tax laws in effect as broad and comprehensive in the language employed as to the property embraced as the tax law of 1891, had been constantly acted upon and construed by both officers and property owners as not including life insurance policies as subjects for taxation. And the taxing officers and taxpayers of the several states of the Union had construed similar taxing laws in a similar way. Up to that time no attempt had been made, so far as we are advised, by any civilized government, either by legislation, executive, or administrative action to select and treat life insurance policies as property which ought to be taxed and

The State Board of Tax Commissioners et al. v. Holliday et al.

subject them to taxation. These are the circumstances under which the legislature acted in passing the tax law of 1891. The presumption is that these historical facts were known to the legislature. *Mode v. Beasley*, 143 Ind. 306. Sutherland on Stat. Const., section 333, says: "It is presumed that the legislature is acquainted with the law; that it has knowledge of the state of it upon subjects upon which it legislates; that it is informed of previous legislation and the construction it has received."

Therefore, the legislature, with knowledge that all the previous tax laws, practically the same as the tax law it passed in 1891, had been construed by all the officers charged with their execution, as well as by the people affected by them, as not including life insurance policies, it would be most unreasonable to suppose that the legislature, by the use of the words we have quoted from that act, intended to include such policies as subjects for taxation. In the light of all these facts, the intent not so to include them seems apparent, because, as is said by Sutherland on Stat. Const., section 333, "if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effectuate that intention." Nor do we mean by this that in order to subject property to taxation that it shall be specifically named in the statute. Far from it. Much the larger part of personal property is subjected to taxation by legislative action under the general designation of personal property. But we are dealing with the question of interpretation and legislative intent.

But there is still a stronger reason for the conclusion that the legislature did not intend to include life insurance policies by the tax law of 1891 as subjects for taxation, and that is the fact that the act provides

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

no regulation for their valuation. In that and subsequent statutes the legislature has provided special regulations for the valuation of all those classes of property that are difficult to value, different from that provided for ordinary property, and many of them not as difficult as life insurance policies. For instance, the property of banks and bankers, foreign corporations, such as insurance companies, telegraph companies, telephone companies, express companies, sleeping car companies, railroads, and the like. Special regulations are provided by statute for valuing for taxation the several classes of property above mentioned. And the question arises why did the legislature provide no regulations for the valuation of life insurance policies if it intended to include them by the language we have quoted from the tax law of 1891? In *Riley v. Western Union Tel. Co.*, *supra*, it is said: "Thus there would seem to be no provision made for the manner of assessing the stock of foreign corporations, and this would seem to be a pretty strong reason for inferring that the legislature did not intend by sections 84 and 85 to assess the capital stock of foreign telegraph companies."

We therefore conclude that the legislature did not intend to make life insurance policies subjects of taxation, and failing to provide any regulations for, or manner of assessing or valuing such policies for taxation, if they do fall within the literal words of the tax law of 1891, we hold that the act of the State Board of Tax Commissioners, in providing regulations for, and ordering them to be assessed for taxation was without authority of law, and void. It follows that the complaint was sufficient, and the evidence supports the finding, and hence the circuit court did not err in overruling the motion for a new trial. The judgment is affirmed.

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

DISSENTING OPINION.

HOWARD, C. J.—Being unable to agree with the majority of the court in the conclusion reached by them in this case, I desire, on account of the importance of the questions involved, to give my reasons for dissenting.

The appellees, in their elaborate and carefully prepared briefs, have advanced many arguments, and cited numerous authorities, in support of propositions which do not seem to be at all in dispute. That the power of the legislature over the subject of taxation is a sovereign power and admits of no limitation except that which is imposed by the constitution; that section 1, article 10, of the constitution which declares that "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law," though mandatory, is not self-executing, but requires legislative action to vitalize its provisions; that it is a legislative power, limited only by the constitution, to select the subjects of taxation and to provide by law rules and regulations to secure a just valuation thereof; that article 5 and section 1, article 14 of the amendments to the constitution of the United States strip the State of all power to lay a tax on either person or property, except by authority of law, under which every person within the jurisdiction of the State shall be entitled to the equal protection of the laws and to the due process of the law; that it has been the policy of the legislature to avoid double taxation wherever possible, and that, while the legisla-

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

ture might, in the exercise of its plenary taxing power, have imposed double taxation upon any or all taxable property and rights, yet it was not bound to do so; that section 1, article 10, of the constitution of the State makes it the duty of the legislature to prescribe, by law, regulations or methods for the just valuation of all property for taxation, and where the legislature has prescribed such regulations and methods they must be followed; that the instrumentalities of taxation are purely of legislative origin, and property cannot be valued for taxation by any other authority than that which is selected by the statute; that the powers of government are legislative, executive, and judicial, and, except as to *quasi* exercise of these powers, no officer of one department of government can exercise any of the functions of either of the other departments; and that it is presumed that the legislature never intends its enactments to work public inconvenience or private hardships, and, if a statute is doubtful or ambiguous, or fairly open to more than one construction, that construction should be adopted which will avoid such results, all these are propositions to which every one will give his assent, and it is therefore not necessary further to consider what counsel have, with so much learning and ability, advanced in their support.

By clause first of section 120 of the tax law (section 8538, Burns' R. S. 1894), it is made the duty of the State Board of Tax Commissioners, "To prescribe all forms of books and blanks used in the assessment and collection of taxes, and to change such forms when prescribed by law, in case any such changes shall be necessary." And in section 258 of the law (section 8676, Burns' R. S. 1894), it is further provided that, "The State Board of Tax Commissioners is hereby authorized to prepare for the use of assessors a more

The State Board of Tax Commissioners et al. v. Holliday et al.

complete and perfect form of 'schedule of property' than that set out in section 53 of this act, with a view of securing a full assessment of all the property of the State; and all county auditors are directed to use such form, in preparing blanks for the use of assessors." Acting under the foregoing provisions of the statute, the state board, in preparing the form of schedule for the year 1897, inserted, under the lists of personal property known as credits, the following questions to be answered by taxpayers holding life insurance policies of the kind indicated: "(7) Number of paid-up life insurance policies, and their value ———. (8) Number of non-forfeitable and partly paid-up life insurance policies, and their value ———." The contention of the appellees is that the action of the state board, in including these items in the tax schedule form, was invalid, as a usurpation of legislative authority; while appellants contend that the action of the board was purely administrative, and in compliance with the express authority of the legislature. Appellees do not contend that life insurance policies are not taxable under the constitution, but say that the legislature has never exercised its right to tax them. "We do not contend," say counsel, "that the legislature does not possess the power to list and value life insurance policies, or the surrender value of such policies, by the enactment of a statute selecting them as subjects of taxation, and prescribing regulations for their just valuation; for the legislative power of taxation extends to all classes of property, tangible and intangible, rights and franchises, to persons, to occupations, and to professions; and, while it may be conceded that the legislature possesses the power to tax life insurance policies, we contend that it has never exercised that power." Counsel for appellants, on the other hand, while admitting that the

The State Board of Tax Commissioners et al. v. Holliday et al.

power to assess and collect taxes, and to establish rules and regulations therefor, is purely a legislative power, subject to the provisions of the constitution; yet contend that the legislature has, in fact, provided for the assessment and collection of taxes on property such as that here in controversy, and has provided all machinery, rules, and regulations therefor. It will be admitted, as contended for by counsel for appellees, citing *Hare v. Kennerly*, 83 Ala. 608, 3 South. 683, that "The power of taxation is inherent in the legislative branch of the government, and constitutional provisions relating thereto are not grants of power, but are limitations upon the exercise thereof." Our constitution, however, does not assume to grant authority to the legislature to tax property, but rather assumes that the legislature has power to tax all property. What the constitution does is to command that "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation." And this command, as seems to me, the General Assembly has complied with.

It is practically conceded by appellees that the legislature has no power to exempt any property from taxation, save that only for which express provision is made in the constitution itself, namely: property used "for municipal, educational, literary, scientific, religious, or charitable purposes;" and it is not contended that the property here in question belongs to any of these classes. This court has more than once held that no exemptions from taxation, save those so expressly provided for in the fundamental law, can be made by the legislature. By section 7 of the act of December 21, 1872 (Acts 1872, p. 57, 1 Davis' R. S. 1876, 73), the legislature had attempted to exempt from taxation property to the amount of \$500.00, owned by widows and others there named having less

The State Board of Tax Commissioners et al. v. Holliday et al.

than \$1,000.00 worth of property; and it was contended that this act was constitutional, as exempting property for charitable purposes; but, in *State v. City of Indianapolis*, 69 Ind. 375, and *Warner v. Curran*, 75 Ind. 309, this claim was denied, and, in the first of these cases, it was said: "It is the use of the property for the public benefit which will authorize its exemption from taxation by law. To exempt by law private property, owned by a private citizen, and used for a private purpose, on account of the sex or domestic relation of the owner, is a violation of the constitutional principle that taxation shall be uniform and equal on all property, both real and personal." Citing also *Cooley on Taxation*, 153, that "It is difficult to conceive of an exemption law which selects single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, makes them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation." So by the act in force March 7, 1887 (Acts 1887, p. 40), substantially re-enacted as section 89 of the tax law (section 8507, Burns' R. S. 1894), provision was made for the taxation of building and loan associations. And under this statute it was contended, in *Deniston v. Terry*, 141 Ind. 677, that paid-up or partly paid-up building and loan stock, even where no money had been borrowed upon it, was exempted from taxation. The court, however, disagreed with this contention, holding that a proper construction of that statute did not require that such stock should be exempted from taxation. "If we thought otherwise," is was there said, "we should have to consider the statute itself unconstitutional." It may be observed that, in that case, the property to be taxed, namely, building and loan stock, had not then, either

The State Board of Tax Commissioners et al. v. Holliday et al.

by the legislature or by the State Board of Tax Commissioners, been required to be listed on the schedule as property to be assessed for taxation. Yet it was held that the stock was properly listed by the assessor as omitted property, the court saying: "Such shares of stock are of the apparent value of the money paid upon them to the association, and should be taxed accordingly, as any other credits." But, if the legislature could not, by positive enactment, exempt from taxation any property except that explicitly provided for in the constitution, can it be said that it could accomplish this end by simply failing to make any enactment on the subject? Can the legislature do by indirection what it could not do directly? Can it do by silence what it could not do by speaking? It would be strange, indeed, if that were possible. However it may be in other jurisdictions, having constitutions different from ours, it must be held under our constitution, that the legislature must do, what it has in fact done, that is, select as the subjects of taxation all property both real and personal, save that only which the constitution itself, for reasons of public policy, provides may be exempted.

Other apparent exceptions found in the statute, and to which counsel refer with so much confidence, as showing the exercise by the legislature of the right to select property for and exempt it from taxation, otherwise than as provided for in the constitution, are in truth but provisions for avoiding double taxation, or for avoiding attempts to tax property not within the jurisdiction of the State. *Senour v. Ruth*, 140 Ind. 318, and other like cases relied upon by counsel, give illustrations of such apparent selections and exemptions, but are no authority for holding that any property but that expressly provided for in the consti-

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

tution can be exempted from taxation. But it is said that the constitution, though mandatory, is not self-executing, and requires that the legislature should provide for the assessment and taxation of all property, and should prescribe rules and regulations to secure a just valuation for that purpose. This is conceded; but it is manifest from the statute that the legislature has performed this duty, in relation to the property under consideration, as well as all other property. By section 3 of the tax law, section 8410, Burns' R. S. 1894), the legislature has literally obeyed the mandate of the constitution, by selecting for taxation: "All property within the jurisdiction of this state, not expressly exempted." And by section 5 of the same law (section 8412, Burns' R. S. 1894), it has made provision for all the exemptions authorized by the constitution, namely: of property used "for municipal, educational, literary, scientific, or charitable purposes." By thus expressly naming the particular property to be exempted, the General Assembly has, by necessary implication, forbidden the exemption of any other property from taxation. The maxim, *expressio unius exclusio alterius*, could find no apter illustration. *Fletcher v. Oliver*, 25 Ark. 289. Indeed, it must be apparent that, had the legislature gone no further than the two sections referred to, in naming the property to be taxed, and had it then made provision for proper assessing and collecting officials, the scheme would have been a sufficient compliance with the constitutional requirements. Even counsel for appellees admit as much, saying: "We do not doubt that if the State desired to comprehend in one broad scheme of taxation all property, both tangible and intangible, it had the power to do so; and under such a scheme the cash surrender value of life insurance policies could have been included among the subjects

of taxation." And this is quite in harmony with what is said by Mr. Cooley (Cooley on Taxation, 272), that "The statute may or may not designate what shall be included by the assessors in their estimate; but the taxable property will be indicated in some form, either by the enumeration of what shall be considered taxable property, or by some general provision that all property shall be taxed except what is specifically exempt." In section 3 of our law, as we have just seen, is found the "general provision that all property shall be taxed" and in section 5 is set out "what is specifically exempt," as authorized by the constitution. But the legislature has gone much further than is thus indicated by Mr. Cooley as sufficient. It has provided for a full set of fiscal officers,—township assessors and deputies; county assessors, auditors, treasurers, and boards of review; and an Auditor and Treasurer of State, besides a State Board of Tax Commissioners. It has also classified all the property of the State, assigning to each of the taxing officials and boards certain defined duties as to each class and kind of property. Single items of property, located in one place, and capable of being valued by one man are assigned, in the first instance, to the township assessor. Certain corporate property, of more complicated character, is referred to the county board of review; and still other property, extending beyond the county limits, or throughout the State, and having varying values, difficult to estimate, and affected by questions concerning matters without as well as within the State, are referred to the State Board of Tax Commissioners. In addition, a complete system of review and appeal is provided for, from the lowest to the highest assessing officers. One standard of valuation is provided for all this property, and to be applied without variation by all the taxing officers

The State Board of Tax Commissioners et al. v. Holliday et al.

and boards,—the true cash value. Whatever property is to be assessed, and whatever officer or board is appointed to assess it, provision is made in every case for a report or return by the property owner to the assessing officer or board. The assessment is set in motion by the property owner himself. But the officer or board is not bound by any such report, return, or schedule, the same being used as information simply, and as a guide to enable the assessing authority the better to judge of the true cash value of the property. Further provision is made for the listing by the officers and boards of property not fully returned by the owner, or altogether omitted from his schedule. In section 48 of the law (section 8458, Burns' R. S. 1894), it is provided that the property owner shall, on proper blanks, furnish to the assessor "a full and correct description of all the personal property of which such person was the owner on the first day of April of the current year." And, further, that the property owner "shall fix what he deems the true cash value thereof to each item of property for the guidance of such assessor, who shall determine and settle the value of each item, after examination of such statement, and also an examination under oath of the party or of any other person, if he deems it necessary. In determining and settling such valuation, he shall be governed by what is the true cash value, such being the market or usual selling price at the place where the property shall be at the time of its liability to assessment, and, if there is no market value, then the actual value." In this section, the requirement to assess "all property" is repeated. The property owner is directed to return and value, and the assessor is directed to assess at its true cash value, "all the personal property of which such person was the owner on the first day of April of the current

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

year." We do not need to look to any form of schedule. The direction of the statute is, that "all the personal property" be returned and valued by the owner, and assessed by the assessor. Everything included under the head of personal property must be set down and assessed. Again, in section 50 of the law (Acts 1895, p. 21; section 8460, Burns' R. S. 1894), credits, no less than chattels, are included in personal property, and required to be returned and taxed. And under credits are named "All bonds, notes, mortgages, accounts, demands, claims, and other indebtedness owing to such person." Could any more general words be used than these,—“demands, claims, and other indebtedness?” But this is not the only statute that uses these broad words in classifying personal property. In section 1309, Burns' R. S. 1894 (1285, R. S. 1881), it is said: "The phrase 'personal property' includes goods, chattels, evidences of debt, and things in action." He would, indeed, be a hardy reasoner who should assert, that, although a life insurance policy is a chose in action, a demand or claim which one person has against another; and although the legislature has expressly provided that "all personal property," including by name "demands and claims," should be listed and returned for taxation, yet that a life insurance policy is not taxable for want of legislative authority to tax it. A chose in action, as held in *People v. Tioga*, 19 Wend. (N. Y.) 75, comprehends all demands arising on contract. As defined by Burrill Law Dic., "Chose in action is a thing which a man has not the actual possession of, but which he has a right to demand by action, as a debt or demand due from another." See, also, Chit. Pr. 99.

In re Denny, 2 Hill (N. Y.) 220, it was said that the word demand was of much broader import than debt, and embraced rights of action beyond those that can

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

properly be called debts. And in *Gray v. Palmer*, 9 Cal. 616, the court said: "The word *claim* is certainly a very broad term, when used in certain connections and in certain matters. Lord Coke truly says that 'the word *demand* is the largest word known to the law, save only, *claim*; and a release of all *demands* discharges *all rights of action*.'" See, also, Co. Litt. 291, and Bouvier Law. Dic. In *Scott v. Morris*, 9 Serg. & R. (Pa.) 123, the court said: "The word demand is very comprehensive. It includes everything which the creditors would have become entitled to recover by suit."

In 3 Am. and Eng. Ency. of Law, 235, following Rapalje & Lawrence Law Dic., a chose in action is defined to be "a right of proceeding in a court of law to procure the payment of a sum of money." As examples of choses in action, policies of insurance are there included with promissory notes, bills of exchange, debts, and annuities; and authority for thus classifying policies of insurance as choses in action is found in *Ex parte Ibbetson*, 8 Ch. Div. 519, where it is said: "It is clear beyond all argument that a policy of assurance is a 'thing in action.'" Does it seem reasonable that some such choses in action, as promissory notes, bills of exchange, and debts should be taxable, but that a policy of life insurance, though found in the same class should not be taxable?

It was said by this court in *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722, that: "A policy of insurance is a chose in action governed by the same principles applicable to other agreements involving pecuniary obligations. * * * A life policy is an agreement to pay a sum of money at the termination of the life insured. The party holding and owning such a policy, whether on the life of another or on his own life, has a valuable interest in it, which he may

The State Board of Tax Commissioners *et al. v. Holliday et al.*

assign, either absolutely or by way of security, and it is assignable like any other chose in action," citing Bliss Life Ins. 506, and many other authorities. This holding was approved, in *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285, where Zollars, J., speaking for the court, said: "That the policy was personal property, under our statute, * * * we think there can be no question. In consideration of the payment of the annual premiums, it contained a definite and fixed promise to pay a definite and fixed amount of money, upon the happening of an event, which was uncertain in nothing except the time when it might occur. Such a policy of insurance is a chose in action, governed by the same principles applicable to other agreements involving pecuniary obligations." Again, in *Amick v. Butler*, 111 Ind. 578, Judge Mitchell said: "It has never been seriously questioned but that a person may insure his own life, and by the terms of the policy appoint another to receive the money, upon the event of the death of the person whose life is insured; or, having taken a policy, valid in its inception, that he may in good faith assign his interest in such policy, as in any other chose in action." Citing a great number of authorities, and adding: "The cases which hold invalid the taking or assignment of insurance policies turn upon the fact that in each case the transaction was found to be merely colorable, and a scheme to obtain speculative insurance. *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116." Nor can it be said that a life insurance policy is not a claim or demand, for the reason that no action may be had upon it before the maturity of the policy. A policy of insurance, as we have seen, is a chose in action; and, as held in *Haskell v. Blair*, 3 Cush. (Mass.) 534, a chose in action does not necessarily import a present right of action, but simply a right not yet reduced

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

into possession. As otherwise defined, a chose in action is "a right not reduced to possession," or "the interest in a contract, which in case of nonperformance, can only be reduced into beneficial possession by an action or suit." Chit. Bills (12th Am. ed.), 6. Neither is it true that because no money can be realized from a life insurance policy until its maturity, or the death of the insured, it has therefore no taxable value. A promissory note may not be due for twenty years, or until the death of the maker, yet no one would say that it was therefore without value. And even if a policy could not be sold to pay the delinquent tax assessed upon it, as contended, still, that would not be a reason to show that it is not taxable. In section 48 of the tax law, as we have seen (section 8458, Burns' R. S. 1894), provision is made for the assessment at its actual value of property that has no market value. Then in section 4 of the law (8411, Burns' R. S. 1894), provision is made for the taxation of "goods, chattels, and effects belonging to inhabitants of this State situate without this State." Yet such goods situate without this State could not be sold for the taxes. As said in *Boyer v. Jones*, 14 Ind. 354, "the law in question operates upon the owner of the property, he being a resident, and can be enforced against him, although it have no extra-territorial effect." Taxes due on property may be collected by sale of other property of the owner; and, because a chose in action cannot be sold, it by no means follows that it is without value, or that it is not a claim or demand which one may enforce against another, and which may consequently be assessed and taxed under the statute.

Another untenable position assumed by counsel for appellees is, that "all kinds of insurance policies must be taxed or none can be taxed." It is not a

question of the particular name of the claim, demand, or chose in action, but of its present value. The insurance policies here proposed for valuation and taxation are not all policies,—not fire, marine, or other like policies, where the insured can receive nothing except in case of loss; not policies which are merely for indemnity and protection in case of loss, and which, therefore, may never have any money value, as there may never be any loss. Neither is it proposed to tax all life insurance policies, but only those that have so far matured as to have an absolute present money value. Whether other insurance policies are of present value, and therefore taxable, is not a question here for decision. The policies here proposed to be taxed are “paid-up,” and also “non-forfeitable and partly paid-up” life insurance policies. It is with these alone that we are concerned. If the companies are solvent, it is too clear for argument that such policies have an absolute present money value. Whether paid-up or partly paid-up, they are non-forfeitable. The reserve fund of the company is pledged to their payment. “This reserve fund,” as said in *New York Life Ins. Co. v. Statham*, 93 U. S. 24, “has grown out of premiums already paid. It belongs, in one sense, to the assured who has paid them, somewhat as a deposit in a savings bank is said to belong to the person who made the deposit.” The circumstance that it may be difficult to determine this value is no more controlling than in case of the valuation of any other credit that the assessor is called upon to value and tax. If it is personal property, a credit, a claim, demand, or chose in action, and has a present money value, it must be assessed. “It is a cardinal rule which should never be forgotten,” said Brewer, J., in *Adams Ex. Co. v. Ohio State Auditor*, 166 U. S. 185, “that whatever property is worth for the pur-

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

poses of income and sale, it is also worth for purposes of taxation."

Nor is it any reason why this property should not be taxed that it was not heretofore returned for taxation. The legislature, as we have seen, has provided that all property, not expressly exempted under authority of the constitution, shall be taxed; it has provided, moreover, that all personal property of the class to which this belongs shall be taxed. New forms of property are constantly presenting themselves, and because taxing officers have not had their attention drawn to this or that species of property it by no means follows that such property should not be taxed as soon as observed or discovered. So it was said by the Supreme Court of the United States in *Vicksburg, etc., R. R. Co. v. Dennis*, 116 U. S. 665: "The omission of the taxing officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed." See, also, *Lee v. Sturges*, 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556, where it is said: "The fact that this kind of property has not heretofore been listed, affords no reason for continuing to omit it. Laches is not to be imputed to the State." See, further, *Black Interpretation of Laws*, at p. 223, and *Denney v. State*, 144 Ind. 503, at 538, 539, 31 L. R. A. 726.

Counsel for appellees strive to make something out of the case of *Riley v. Western Union Tel. Co.*, 47 Ind. 511. The court there simply decided that the capital stock of an interstate telegraph company could not be taxed in Indiana. That is as true under the law of 1891 as it was under the law of 1872. The reason why the telegraph property in this State was not taxable, under the facts stated in the *Riley* case, is, that the method

The State Board of Tax Commissioners et al. v. Holliday et al.

there followed did not segregate the property owned by the company in Indiana from that owned by it in other states. Had the State Board of Equalization then proceeded by the method employed by the state board in 1891 for the assessment of the Indiana property of interstate railroad companies, all objections there made to the tax would have vanished, under the decisions of this court, and those of the Supreme Court of the United States in the Backus cases.

Another contention of counsel for appellees, if I understand it, is that it was a usurpation of legislative authority for the State Board of Tax Commissioners to publish certain "rules and regulations by which the value of life insurance policies is to be ascertained by the assessors." But, by clause 9 of section 120 of the tax law (section 8538, Burns' R. S. 1894), the board is not only given the power, but it is made its duty, "To make such rules and regulations as the board shall deem proper to effectually carry out the purposes for which the board is constituted." One of the purposes for which the board is constituted is stated in clause 3 of said section to be, "To see that all assessments of property in this State are made according to law." The mere circumstance that it may be difficult to determine the true cash value of any species of property, is not, of itself, sufficient to show that the legislature must determine by law all the details as to the manner in which the assessment shall be made. Of course, in so far as the legislature has provided a method, that must be pursued. But the details of any method may well be, in great measure, as, indeed, they have been in many cases, left to be worked out by the practical experience of the administrative officers. As to railroad property, for illustration, the state board is given power in section 137 of the law (section 8555, Burns' R. S. 1894), to assess

The State Board of Tax Commissioners et al. v. Holliday et al.

what is denominated railroad track and rolling stock, at its true cash value. To enable the board to do this, the companies are required to make certain returns as to mileage, rolling stock, capital stock, indebtedness, and listed tangible property in the State. No method, however, as to the manner in which the true cash value shall be determined is given. Yet the board went ahead, and formulated the system of railroad assessment now in use. The method adopted may be stated as follows: From the returns made, from evidence given before the board, from standard economic publications, and particularly from a consideration of the bonded indebtedness added to the market value of the capital stock, the whole value of any railroad property, both within and without the State, is determined; and then, for the value in this State, such proportion of the whole value is taken as the mileage of this State bears to the whole mileage. It may be that this system was suggested by sections 79, 80 of the law (sections 8497, 8498, Burns' R.S. 1894), in which provision is made for apportioning the value of the whole line in the State among the several counties, townships, cities, and towns; but the fact remains that the statute, while indicating the data and supplying the machinery, had prescribed no method by which such data and machinery should be used in first determining the whole value of any railroad property within the State. The act simply provided that the board should "assess the railroad property, denominated in this act as railroad track and rolling stock, at its true cash value." Yet the method so provided by the board, independent as it was of any direction by the legislature, and although, to reach the end in view, the board went so far as to determine the value of the property without as well as within the State, was expressly approved by this court and

The State Board of Tax Commissioners et al. v. Holliday et al.

by the Supreme Court of the United States, in *Cleveland, etc., R. W. Co. v. Backus*, 133 Ind. 513, 154 U. S. 439, 18 L. R. A. 729, and other Indiana tax cases. Nor was the method so adopted unchallenged in those cases; on the contrary, it was there stoutly contended that the system so adopted provided for the taxation of interstate commerce, and also that it imported extra-state values. And the courts ruled expressly against those contentions. If, as counsel well say, the legislature had attempted by law to tax the certificates of stock of railroads and other like companies owning lines partly within and partly without the State, it would have been met at the threshold with the constitutional proposition, that the power of the State legislature over the subjects of taxation stops with the limits of the State. "Therefore," continue counsel, "to provide a method whereby great corporations doing business in this State could be subjected to the taxing power of the State, the value of the intangible property not within the State was considered in fixing a value to the portion of such intangible property used in connection with the tangible property and contracts with railroad companies within the jurisdiction of the State." But, as we have seen, it was not the legislature, but the State Board of Tax Commissioners, that adopted this method for the taxation of railroad property. There is nowhere a hint in the law that "the value of the intangible property not within the State" should be considered in fixing a value to the portion of such intangible property which is within the State.

It may be noted that the method thus, without express legislative direction, adopted by the state board, and so approved by the courts, and extolled by counsel, for the assessment and taxation of railroad property, was afterward followed by the legislature

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

in providing for the assessment and taxation of telegraph and other like property. Acts 1893, p. 374 (section 8484, Burns' R. S. 1894); *Western Union Tel. Co. v. Taggart*, 141 Ind. 281, 163 U. S. 1, 2 Am. and Eng. Corp. Cas. (N. S.) 187, 5 Am. Elec. Cas. 646.

The rules and regulations for the assessment of property here in controversy are quite in harmony with the whole scheme of our laws and practice for the assessment of all property. The legislature has simply provided, in obedience to the constitution, that all property not expressly exempted shall be taxed; that it shall be assessed at its true cash value; that different classes of property shall be assessed by different assessors and assessing boards; and that the State Board of Tax Commissioners shall have general supervision over the whole subject of taxation, and shall frame such rules and regulations as may aid in carrying out the purposes of the law. Certainly, therefore, the board might provide rules by which assessors should be guided in determining the true cash value of life insurance policies. Such rules do not, as counsel intimate, deprive the taxpayer of the right, as in other cases, of first returning and valuing his policy at what he believes to be its true cash value. Neither do they relieve the assessor of his duty to assess the same property at what he believes to be such true cash value; but the rules are a practical guide to enable the assessor to arrive at the sole end had in view by the legislature in framing our tax laws, namely, that this, as every other kind of property, should be assessed at its true cash value.

Another argument made by appellees is to be noticed. Section 67 of the tax law (section 8477, Burns' R. S. 1894), requires that three per cent. of the gross receipts, less losses paid, of all insurance companies not organized under the laws of this State, and doing

business here, shall be paid in to the State treasury semiannually. Counsel contend that it is but fair to conclude that the legislature intended this three per cent. excise tax to be all the taxation to which such insurance companies should be subject. Had this income been exacted of all insurance companies doing business in this State, whether organized here or elsewhere, there might be more reason in the contention. But the three per cent. tax is laid on foreign insurance companies only, and, from the language of the section, it is plain that the tax so imposed is but for the privilege of doing business in the State, and for the protection of the citizens against irresponsible companies organized under the laws of other states and countries. The license fee thus imposed is not a tax upon the value of property, but upon the right to do business in the State; and its exaction from such foreign insurance companies has no bearing whatever upon the interpretation to be given to provisions of the tax law claimed to require that policies of life insurance should be taxed. Neither is there here any question of double taxation, even if it could be claimed, as it cannot, that double taxation were unlawful. *Cooley Taxation*, 28, 158, 170; 25 Am. and Eng. Ency. of Law, 67, 68.

What counsel have said of the tax schedule does not seem to be of controlling force. While some form of schedule is a convenience for the taxpayer, to enable him to make return of all his property for taxation, yet the schedule is not a necessary part of the tax law, but only a convenience for its due administration. For nearly sixty years after the organization of the State government, or until 1872, under both the old and the new constitution, no schedule of property was set out in the tax law, but the taxing officers furnished their own forms. R. S.

The State Board of Tax Commissioners et al. v. Holliday et al.

1831, p. 426; 1 R. S. 1852, p. 105; 1 Davis' R. S. 1876, 72. When the tax law of 1891 was enacted, the legislature undoubtedly perceived that the old form of 1872 was quite imperfect, many items, almost if not quite obsolete, being retained, while new and much more important items of property, resulting from the increased wealth and development of the State, were wholly omitted. Not only, therefore, was it made the duty of the state board, in section 120 of the law (section 8538, Burns' R. S. 1894), to prescribe all forms to be used by the taxing officers; but in section 258 (section 8676, Burns' R. S. 1894), the board was specifically authorized to prepare a more complete and perfect form of schedule of property, thus restoring to the taxing officers the purely administrative function exercised by them without question for more than half a century. Under the constitutional power to "prescribe such regulations as shall secure a just valuation for taxation of all property," there is no doubt that any method of taxation prescribed by the legislature must be strictly pursued; but if the legislature commits such an administrative detail as the preparation of a schedule of property to the taxing officers, the compliance of the officers with such direction will not be any assumption of legislative authority, but rather in obedience to such authority. The laws for taxing property are, however, all independent of the form of schedule. Such form must follow, not make, the law. All that counsel have said as to the wording of the schedule will consequently have but little to do with the question as to whether paid-up and non-forfeitable life insurance policies are taxable or not. If those policies are taxable under the law, the board did not violate the law by including them in the schedule; if, however, they are not made taxable by the law, they would not become tax-

The State Board of Tax Commissioners et al. v. Holliday et al.

able merely because placed in the schedule, even if the schedule were prepared by the legislature itself. What counsel have said of the schedule may, however, be referred to section 50 of the law (section 8460, Burns' R. S. 1894), which section prescribes what the schedule shall contain. Clause 15 of section 50 provides for listing "All other goods, chattels, and personal property, not heretofore specifically mentioned, and their value, except property specifically exempt from taxation." The corresponding, and in fact equivalent, item in the schedule is, "Value of * * * all other property, not specified above, required to be listed." Counsel say: "The important part of this statement is 'all other property, not specified above, required to be listed.' The legislature has left no doubt as to two propositions at least contained in this statement: (1) That it refers to property not specified in the schedule; (2) that it refers to property which is required to be listed by the statute. This is true without construction, because the statute says so. That this general statement was meant to cover property not specified in the schedule which was required to be listed by the law is beyond controversy." Counsel thus admit that there is some property at least, which, although not mentioned in the schedule, is yet required by the statute to be listed for taxation. It will be conceded, as appellees insist, that the general words in section 50, and also in the schedule formed in pursuance thereof, "all other goods," "all other property," following the description and names of particular chattels, will be taken to refer to other property of the same kind already mentioned,—that is, to other chattels. So that, for example, although "agricultural tools, implements and machinery" are mentioned, while such property as harness, and other

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

stable and livery goods are omitted, yet the latter must be returned for taxation quite as well as the former. In like manner, while no precious stones but diamonds are mentioned, yet pearls, rubies and all other precious stones, though not mentioned, are taxable quite the same as diamonds. Gold and silver plate and plated ware are mentioned, but gold and silver spectacles, thimbles, pens, pencils, and rings, though not mentioned, will be taxed as well as plate or plated ware, under the general head of "all other goods, chattels, and personal property, not heretofore specially mentioned." It is not to be expected that the multitude of forms of personal property can all receive special mention in the law, or even in the schedule. It is enough if general classes or like kinds of property are named, in connection with the broad requirement that all property shall be taxed. And as to chattels, so also as to credits. Some credits are specifically set out in section 50, and in the schedule, as "bonds, notes, mortgages, accounts." But these particulars are followed by the general terms, "demands, claims and other indebtedness;" and it could not in reason or justice be said that other demands, claims, or indebtedness than those specifically mentioned should not also be listed, quite the same as bonds, notes or accounts. By the very rule *ejusdem generis*, so persistently contended for by counsel, it must follow that paid-up or other non-forfeitable life insurance policies must also be listed as credits. See *State v. Daniel* (Wash.), 49 Pac. 243.

Here may be noted what seems rather an ingenious than an ingenuous assumption by counsel for appellees. In the amendment of 1895 (Acts 1895, p. 24), item third of credits in section 50 of the tax law (section 8460, Burns' R. S. 1894), is made to read: "All *bona fide* indebtedness owing to such person, which

The State Board of Tax Commissioners *et al.* v. Holliday *et al.*

shall be held to mean notes and accounts only." The word "to" here is so evidently a clerical error for "by" that it would seem that no one could mistake. Item two just preceding, makes provision for listing all indebtedness due to the taxpayer; and counsel would have us believe that the legislature did so foolish a thing in item three as immediately to re-enact what was just enacted in item two. But a moment's investigation will make it apparent that item three was intended to provide for return of all indebtedness due by the property owner, with a view of deducting the latter indebtedness from the former. So it is provided in section 4 of the tax law (section 8411, Burns' R. S. 1894), that "personal property shall include," for the purposes of taxation, "all indebtedness due to inhabitants of this State above the amounts respectively owed by them;" and a like provision is found in section 114 (Acts 1895, p. 74; section 8532, Burns' R. S. 1894). In the schedule itself, provision is made for deducting *bona fide* indebtedness due by the property owner from indebtedness due to him. The legislature deemed it wise to allow as deductions from credits, only such indebtedness as should be covered by notes and accounts; but it was never intended to define all indebtedness as including only notes and accounts. That would be an absurd and inconsistent meaning to give to the statute. See *Storms v. Stevens*, 104 Ind. 46; *Stout v. Board, etc.*, 107 Ind. 343; *Mayor, etc., v. Weems*, 5 Ind. 547. The whole superstructure built up by counsel on this clerical error in transcribing the third item of credits from the acts of 1891 to the act of 1895, must therefore tumble to the ground.

To conclude: It is conceded that "paid-up" and "non-forfeitable and partly paid-up" life insurance policies constitute "property." It is conceded that

Jarrell, Sheriff, *et al.* v. Brubaker, Administrator.

the constitution requires that all property within the jurisdiction of the State should be taxed; and that it is but equitable and just to those who do pay their taxes that the legislature should carry into effect this provision of the constitution. It is further conceded that it was the solemn duty of the legislature to obey this mandate of the constitution, in respect to this as all other property. The legislature has assumed the performance of this duty, by the enactment of the tax laws of the State. If there were a doubt whether, as to any species of property, the constitutional mandate had been obeyed, the court ought to resolve such doubt so as to construe the law to be that the legislature had performed its duty rather than to hold that it had not. But I think that the case is stronger than this, and that it appears from this opinion that the legislature has, in obedience to its solemn duty, fully provided for the taxation of the property here in controversy. In either case the judgment ought to be reversed.

Monks, J., concurs in the dissenting opinion.

JARRELL, SHERIFF, ET AL. v. BRUBAKER, ADMINISTRATOR.

[No. 18,270. Filed April 6, 1898.]

JUDGMENT.—Liens.—Redemption.—Any judgment creditor whose judgment or decree at the time he offers to redeem shall be a lien on the property sold, junior to that upon which the sale was made, is entitled to redeem real estate sold by a sheriff on execution or decretal order, at any time within one year from the date of sale.
p. 266.

SAME.—Mortgages.—Foreclosure.—Date of Lien.—Sheriff's Deed.—The lien of a judgment in foreclosure of a mortgage upon the mortgaged real estate is of the date of the execution of the mortgage, and where the same is sold on said decree, and a sheriff's deed executed therefor, the lien of the certificate of sale, and the title conveyed by such deed, date back to the date of the mortgage.
p. 267.

LIENS.—Priority.—Redemption.—Estoppel.—The acceptance by the

150	260
150	666
151	329
152	139
152	412
150	280
1153	490
150	280
156	575

Jarrell, Sheriff, *et al.* v. Brubaker, Administrator.

holder of a sheriff's certificate of sale of redemption money from another lien holder in satisfaction of his judgment will not estop the administrator of the deceased owner of the real estate from asserting that the redemptioner's lien was senior to the judgment upon which the sale was made from which it was sought to redeem. p. 268.

LIENS.—*Redemption.*—*Venditioni Exponas.*—Under section 785, Burns' R. S. 1894 (778, Horner's R. S. 1897), concerning the redemption of real estate sold on execution or decretal order, only a judgment creditor, his executors, administrators or assigns, whose judgment or decree at the time he offers to redeem is a lien on the property sold junior to that upon which the sale was made, is entitled to sue out an execution in the nature of a *venditioni exponas* upon the judgment on which the sale was had, and from which the redemption is made. p. 269.

DECEDENTS' ESTATES.—*Quieting Title.*—An action by an administrator to set aside a fraudulent conveyance and to quiet title to decedent's real estate, can be sustained only where it is shown that it is necessary to sell such real estate to pay the debts of the estate. pp. 269, 270.

SAME.—*Judgments.*—*Sales.*—*Redemptions.*—The failure of an administrator to redeem lands of his intestate at a judicial sale, and the redemption thereof by one who had no power to redeem will not deprive such administrator of the right to an order to sell such real estate to pay the debts of the estate. p. 270.

PRACTICE.—*Judgment.*—*Modification.*—Where a judgment gives the party obtaining the same greater or less relief than he is entitled to under the verdict or finding, the remedy is by motion to modify the judgment. pp. 270, 271.

From the Marshall Circuit Court. *Affirmed.*

Charles P. Drummond and Charles Kellison, for appellants.

Wood & Bowser and L. W. Royse, for appellee.

MONKS, J.—Appellee brought this action to quash and set aside as illegal and void a writ in the nature of a *venditioni exponas*, issued upon a redemption of real estate, and for an injunction. Appellants' demurrer to the amended complaint was overruled. Appellants Lawrence and Matchett filed a cross-complaint against appellee. After issues were joined the court, at the request of parties, made a special

Jarrell, Sheriff, *et al.* v. Brubaker, Administrator.

finding of the facts, and stated conclusions of law thereon, and over a motion for a new trial, rendered judgment setting aside and quashing said writ of *restitutioni exponas*, and enjoining appellants from issuing said writ or making any sale of the real estate described in said writ, and that said real estate is subject to the debts of Nicholas W. Galentine, deceased, and liable to be made assets to pay the debts of said decedent, of which estate the appellee is the administrator, and the title to said real estate, for the payment of said debts, is quieted in said appellee as such administrator.

The errors assigned and not waived call in question each conclusion of law, the action of the court in overruling appellants' demurrer to the amended complaint, and appellants' motion for a new trial.

It is not necessary to consider the sufficiency of the amended complaint for the reason that the same questions are presented by the conclusion of law. The special finding, so far as necessary to the determination of the questions presented, is in substance as follows: On December 7, 1877, Nicholas W. Galentine executed a mortgage to John P. Parks on 80 acres of real estate in Marshall county, Indiana (describing it), to secure a note for \$2,000.00, being the unpaid purchase money for said real estate, which mortgage was duly recorded June 6, 1878. On July 8, 1882, Parks recovered a judgment in the Marshall Circuit Court against said Galentine for \$2,274.00 and costs of suit, taxed at \$62.90, and a foreclosure of said mortgage, against said Galentine, and against appellants John K. Lawrence and James H. Matchett, and others. On September 2, said Parks purchased said real estate at sheriff's sale, on said decree of foreclosure, for \$2,361.85, the full amount of principal, interest, and cost due thereon, and the sheriff issued to him a

Jarrell, Sheriff, et al. v. Brubaker, Administrator.

certificate of purchase therefor; and afterwards on September 4, 1893, said real estate not having been redeemed, said Parks, for a valuable consideration, sold and indorsed said certificate to appellants Lawrence and Matchett, who held possession thereof until March 3, 1896. On March 28, 1882, the State Bank of Warsaw recovered a judgment in the Kosciusko Circuit Court for \$1,296.40 and \$12.30 cost, against Nicholas W. Galentine and Norris D. Heller, and on March 30, 1882, said bank caused a certified copy of said judgment to be filed and recorded in the proper order book in the office of the clerk of the Marshall Circuit Court. On March 13, 1884, said Nicholas W. Galentine died, intestate, in Kosciusko county, Indiana, and Andrew W. Wood was thereafter duly appointed administrator of the estate of said Galentine by the Kosciusko Circuit Court, and continued to act as such until June 13, 1895, when he resigned his trust, and appellee was duly appointed administrator *de bonis non* of said estate, and is still such administrator. While said Andrew W. Wood was acting as administrator of said estate, the State Bank of Warsaw instituted an action in the Kosciusko Circuit Court against said administrator, to revive said judgment recovered by it March 28, 1882, and for an order for execution thereon; and such proceedings were had in said court in said cause that on April 13, 1892, said bank obtained a judgment and order of court reviving said judgment, and for the issuance of an execution and an order of sale against the 320 acres of land (describing it) owned by said Galentine in Marshall county, Indiana, at the time said judgment was taken, March 28, 1882. The 80 acres purchased by Parks at the foreclosure sale, the sheriff's certificate of sale of which he sold and indorsed to appellants Lawrence and Matchett was a part of said 320 acres.

Jarrell, Sheriff, *et al.* v. Brubaker, Administrator.

Afterwards, on March 16, 1893, a copy of said judgment of revivor and order of sale was issued out of the Kosciusko Circuit Court by the clerk thereof, to the sheriff of Marshall county, who on June 12, 1893, after a notice of such sale had been given, sold said 320 acres of real estate to said State Bank of Warsaw for \$2,268.85, and thereupon said sheriff issued a certificate of sale for said real estate to said purchaser, which certificate was recorded in the *lis pendens* record in the office of the clerk of the Mashall Circuit Court. On June 9, 1894, appellants Lawrence and Matchett, as the owners of said certificate of sale purchased from said Parks for said 80 acres of real estate, filed their written application and were allowed to redeem said 320 acres of land from the sheriff's sale made on the judgment of the State Bank of Warsaw, and then procured the issuance of the *renditioni exponas* in question, and are proposing to reimburse themselves for the money paid by them to take up the Parks certificate of sale and the amount expended by them in redeeming from said sheriff's sale on the State Bank judgment. On April 21, 1882, said Nicholas W. Galentine owned said 320 acres of real estate, as well as other real estate in Marshall county, Indiana, and on said day executed a warranty deed to appellants Lawrence and Matchett for all of said real estate, and they took possession thereof, and have been in possession of the same. On April 21, 1888, said Andrew G. Wood, then administrator of the estate of said Galentine, filed his petition in the Kosciusko Circuit Court making defendants thereto the widow and children of said deceased, they being his only heirs, and the appellants Lawrence and Matchett and their wives, asking to set aside the conveyance of said real estate to Lawrence and Matchett as fraudulent and void as against the creditors of said Galentine, and

Jarrell, Sheriff, et al. v. Brubaker, Administrator.

subject the same to the payment of his debts. Such proceedings were had in said cause in said court that a judgment was rendered in favor of said Wood, as administrator, and it was decreed that said deed executed by Nicholas W. Galentine on April 22, 1882, to said Lawrence and Matchett was fraudulent and void as to the creditors of said Galentine, and that said appellants Lawrence and Matchett, and each of them, had no right, title, or interest in said lands, and that the title thereto be forever quieted in Andrew G. Wood, as administrator of said estate. On November 9, 1894, Andrew G. Wood, administrator as aforesaid, commenced this proceeding in the Marshall Circuit Court to enjoin the sale of the 320 acres of real estate, sold in satisfaction of the judgment in favor of the State Bank of Warsaw, which is a part of the real estate the conveyance of which to appellants Lawrence and Matchett was set aside as fraudulent by the judgment of the Kosciusko Circuit Court, and the same adjudged subject to the payment of the debts of said Galentine. That all the real estate in Marshall county adjudged by the Kosciusko Circuit Court, as subject to the debts of said Galentine, and the title to which was quieted in the administrator of the estate of Galentine for the payment of said debts, is subject to the payment of the debts of the deceased, and the administrator of said estate has been using due diligence to convert the same into money for the payment of said debts. Appellant Jarrell was sheriff of Marshall county at the time of the commencement of this action, and appellants Lawrence and Matchett are creditors of the estate of said Galentine, deceased, and were such on June 9th, 1894. At the time of the redemption of said 320 acres sold on the judgment of the State Bank of Warsaw, which redemption was made June 9, 1894, by appellants Law-

Jarrell, Sheriff, et al. v. Brubaker, Administrator.

rence and Matchett, there had been no previous redemption from said sale on said judgment, nor had there been any attempt made by any person to redeem from said sale, and that said redemption so made was beneficial to said estate and to its creditors. The court stated as a conclusion of law that the *venditioni exponas* mentioned in the complaint was illegally issued.

Under our statute any judgment creditor, his executors or administrators or assigns, whose judgment or decree at the time he offers to redeem shall be a lien on the property sold, junior to that upon which the sale was made, is entitled to redeem real estate sold by a sheriff on execution or decretal order at any time within one year from the date of sale. Section 783, Burns' R. S. 1894 (771, Horner's R. S. 1897). In *Robertson v. VanCleve*, 129 Ind. 217, it was held by this court that the holder of a sheriff's certificate of sale, had the right to redeem from a sheriff's sale on a judgment the lien of which was senior to that of the judgment upon which such holder's certificate was based, and that such right continued after the expiration of the year for redemption and until the holder of such certificate upon the judgment which was the senior lien demanded a deed from the sheriff; that the right of the holder of such certificate to redeem was that of a judgment creditor under sections 773, 774, Burns' R. S. 1894 (761, 762, Horner's R. S. 1897). The special finding shows that the judgment and decree of foreclosure in favor of Parks was rendered July 8, 1882, while the judgment in favor of the State Bank of Warsaw was taken March 28, 1882; but the mortgage foreclosed in favor of Parks was dated December 7, 1877, and was a lien from that date on the eighty acres of real estate ordered sold in the decree of foreclosure. It is true that the date of

Jarrell, Sheriff, *et al.* v. Brubaker, Administrator.

the lien of the judgment in favor of Parks on all of the real estate of the judgment defendant in Marshall county, except the eighty acres described in the mortgage and decree of foreclosure, was July 8, 1882, the date of the judgment, and such lien was junior to the lien of the judgment of the State Bank of Warsaw, which was March 28, 1882; but the eighty acres was sold on the decree of foreclosure to Parks, and he assigned the sheriff's certificate of sale on said decree to the appellants Lawrence and Matchett.

If the amount for which said eighty acres was sold to Parks on the decretal order had been insufficient to pay the full amount of the judgment in said case, and any part of said three hundred and twenty acres of real estate of the judgment defendant, not included in the mortgage and decree of foreclosure, had been sold to satisfy the part of the judgment remaining unpaid, the date of the lien of said judgment upon such real estate would have been July 8, 1882, the date of said judgment, and not the date of the mortgage; and the lien of the sheriff's certificate of such sale would also have been July 8, 1882, and the holder of such certificate would have been entitled to redeem from the sheriff's sale on the judgment in favor of said State Bank of Warsaw, as junior judgment creditor.

The lien of the judgment and decree in favor of Parks on said eighty acres of real estate was December 7, 1877, the date of the mortgage foreclosed, and the lien, if any, of the sheriff's certificate of sale, held by said appellants, was also December 7, 1877, *Bateman v. Miller*, 118 Ind. 345, 349; *Vandevender v. Moore*, 146 Ind. 44-51, and cases cited, and was therefore senior and not junior to the judgment of the State Bank of Warsaw. If a deed had been made to said appellants by the sheriff under said Parks certificate of sale, the title would date back to the date of the

Jarrell, Sheriff, *et al.* v. Brubaker, Administrator.

mortgage, December 7, 1877. *Bateman v. Miller, supra.*

It is evident that said appellants had no right, as the holders of said certificate of sale purchased of Parks, to redeem said 320 acres of real estate from the sale on the judgment of the State Bank of Warsaw, although the eighty acres of real estate described in the certificate held by them was a part thereof.

But appellants insist that this is a question between them and the State Bank of Warsaw, and that, when said bank accepted the redemption money, appellee was concluded thereby, and cannot question the validity of such redemption, citing *Carver v. Howard*, 92 Ind. 173, 178; *Pence v. Armstrong*, 95 Ind. 191, 200; *Harvey v. Krost*, 16 Ind. 268, 271; *Scobey v. Kinningham*, 131 Ind. 552. It is not expressly found that the State Bank of Warsaw ever accepted said redemption money, but if the special finding did so state, such acceptance would not estop appellee from asserting that said appellants' lien was senior, and not junior, to the judgment upon which the sale was made and from which they sought to redeem. Appellants' rights, if any, are statutory, and they can only obtain what the statute grants, and as the statute provides, and not otherwise. *Scobey v. Kinningham, supra*, and cases cited.

The acceptance of the redemption money by the State Bank of Warsaw estopped said bank from disputing said redemption, but it did not estop appellee from questioning the capacity in which the said appellants acted, nor from requiring that appellants follow the law in enforcing their lien, if any they had. *Scobey v. Kinningham, supra*. As was well said in *Scobey v. Kinningham, supra*, at p. 555, "It is not possible for two persons by a transaction between themselves to create an estoppel against a third person who was neither a party to the transaction nor in privity with either of the parties."

Jarrell, Sheriff, *et al.* v. Brubaker, Administrator.

Under our statute concerning the redemption of real estate sold on execution or decretal order, only a judgment creditor, his executors or administrators or assigns, whose judgment or decree at the time he offers to redeem is a lien on the property sold junior to that upon which the sale was made, is entitled to sue out an execution in the nature of a *venditioni exponas* upon the judgment upon which said sale was had, and from which the redemption is made. Section 785, Burns' R. S. 1894 (773, Horner's R. S. 1897); *Harvey v. Krost*, *supra*, 276.

It follows, therefore, that as the lien, if any, of the sheriff's certificate of sale for said eighty acres of real estate, held by appellants Lawrence and Matchett, was senior, and not junior, to the judgment of the State Bank of Warsaw, they were not entitled, as against appellee, to collect the money paid by them in redemption of said three hundred and twenty acres of real estate by *venditioni exponas*, under the provisions of section 785, Burns' R. S. 1894 (773, Horner's R. S. 1897). Whatever rights appellants may have by virtue of said redemption, if any, they must enforce in some other way than by said writ. The recovery of the judgment and decree by the administrator of the estate of Galentine, that the conveyance to appellants Lawrence and Matchett was fraudulent and void as to the creditors of Galentine's estate, and quieting the title to said real estate in said administrator, in a proceeding to sell said real estate to pay the debts of said Galentine, deceased, gave such an interest in said real estate to such administrator, as authorized him to bring this action. It was not essential to the maintenance of this action that he should first obtain an order to sell the real estate to pay debts. The decree of the court setting aside said conveyance to said appellants, and quieting the title

Jarrell, Sheriff, *et al.* v. Brubaker, Administrator.

in said administrator, could not be rendered unless proof was made that it was necessary to sell such real estate to pay the debts of said estate. It is only when it is necessary to pay the debts of the estate that an administrator can sustain an action to set aside conveyances of real estate made by his intestate. Such recovery is only allowed for this purpose. Sections 2486, 2487, 2488, Burns' R. S. 1894 (2333, 2334, 2335, Horner's R. S. 1897); Henry's Prob. Law., section 198. Such decree was in effect that such administrator was entitled to an order to sell said real estate, upon filing the proper appraisement and bond.

The failure of the administrator of Galentine's estate to redeem said three hundred and twenty acres of land from the sale on the judgment of the State Bank of Warsaw, and the redemption thereof by said appellants, did not deprive such administrator of the right to an order to sell said real estate to pay the debts of his intestate. In making such redemption, such appellants were either mere volunteers or they made the same to protect their property or interests. If the former, they are without remedy; but, if the latter, they hold a lien for said redemption money, and can in a proper action enforce their rights. It follows, therefore, that the court did not err in its conclusion of law that said writ of *venditioni exponas* was illegally issued.

Appellants Lawrence and Matchett, by their cross-complaint, sought, in the event said writ of *venditioni exponas* was set aside, and the collection thereof enjoined for any cause, to have the amount paid to redeem said real estate from the sale on the judgment of the State Bank of Warsaw, and the interest thereon, found by the court and adjudged a lien on said real estate, and an order for the sale thereof upon the failure of appellee to pay said amount within such

time as the court might fix. They claim that upon the facts found they were entitled to a judgment and decree that said real estate be sold by the sheriff, and that the amount of said redemption money and interest be paid to them next after the payment of costs, as prayed for in said cross-complaint. Said appellants urge this contention under the specification of error "that the court erred in its conclusions of law upon the facts found." The trial court did not state any conclusion of law as to whether or not said appellants were entitled to any relief upon their cross-complaint, and we have already held in this opinion that the only conclusion of law stated by the court was correct, and not erroneous. Such assignment of error does not, therefore, present the question urged by said appellants. If said appellants had made a motion that the court state a conclusion of law as to the facts found under the issue joined upon the cross-complaint, or a motion to modify the judgment so as to grant the relief to which they contend they were entitled, and the court had overruled either or both of said motions, and such rulings had been assigned as error, the question urged might have been presented. The rule is that if the judgment gives the party obtaining the same greater or less relief than he is entitled to under the verdict or finding, that the remedy is by motion to modify the judgment. *Branson v. Studebaker*, 133 Ind. 147, 162; *Wood v. State, ex rel.*, 130 Ind. 364, 366; *Stout v. Curry*, 110 Ind. 514, 515; *Baker v. Allen*, 92 Ind. 101, 102; *Terry v. Shively*, 93 Ind. 413, 416-417, and cases cited; *Higgins v. Kendall*, 73 Ind. 522, 527; *New York, etc., R. R. Co. v. Hamlet Hay Co.*, 149 Ind. 344.

The question of whether or not said appellants were entitled to a judgment in their favor, as prayed

Jarrell, Sheriff, *et al.* v. Brubaker, Administrator.

for in their cross-complaint, is not before us for decision.

During the progress of the trial appellee read in evidence the second paragraph of the complaint in the case of Wood, Administrator of the estate of Nicholas W. Galentine, v. Emily Galentine, Lawrence, Matchett, and others, tried in the Kosciusko Circuit Court, being the case in which said administrator recovered a judgment setting aside as fraudulent the conveyance of said real estate to appellants Lawrence and Matchett, and quieting the title thereto in said administrator and ordering the same sold to pay the debts of the estate of said Galentine, deceased. Appellants objected to the evidence upon the ground that said paragraph of complaint was not filed in the Kosciusko Circuit Court until long after the expiration of the time within which the cause of action therein set forth could be maintained by said administrator; in other words, that said paragraph was not sufficient to withstand a demurrer for want of facts. A demurrer to said second paragraph of complaint for want of facts was overruled by the Kosciusko Circuit Court, and by this ruling said court held said paragraph sufficient. The appellants Lawrence and Matchett were parties to said cause, and filed said demurrer, and were bound by said ruling of the court, even if said ruling of the Kosciusko Circuit Court was erroneous. As to all the parties to that case and their privies, the same was binding until regularly vacated or reversed. *State, ex rel., v. Krug*, 94 Ind. 366.

The court did not err, therefore, in overruling appellants' objection to the introduction in evidence of said paragraph of complaint.

There being no available error in the record, the judgment is affirmed.

Vancleave v. The State.

VANCLEAVE v. THE STATE.

[No. 18,894. Filed April 6, 1898.]

CRIMINAL LAW.—Larceny.—Robbery.—Indictment.—The defendant may be convicted of larceny, under an indictment charging robbery. p. 274.

SAME.—Indeterminate Sentence Law.—Constitutionality Of.—The Act, known as the Indeterminate Sentence Law, (Acts of 1897, p. 219), is constitutional. Following *Miller v. State*, 149 Ind. 607. p. 274.

SAME.—Larceny.—Cross-Examination of Defendant.—Practice.—A person on trial for larceny, who becomes a witness in his own behalf, may be asked on cross-examination whether he had not previously been convicted of a similar crime, for the purpose of showing his credibility as a witness. pp. 275, 276.

From the Shelby Circuit Court. *Affirmed.*

Lee F. Wilson and *David H. Thompson*, for appellant.

W. A. Ketcham, Attorney-General, *Merrill Moores'* and *Alonzo Blair*, for State.

MCCABE, J.—The appellant was indicted in the Shelby Circuit Court, charging that he “on or about the 8th day of May, 1897, at said county and State of Indiana, did then and there unlawfully, feloniously, violently, and forcibly, make an assault in and upon one James A. Young, and did then and there and thereby feloniously and forcibly, by violence and the putting said James A. Young in fear, take, steal, and carry away from the person of him, the said James A. Young, fifteen dollars in lawful money of the property of said James A. Young, then and there of the value of fifteen dollars, and one pocket book belonging to said James A. Young, then and there of the value of twenty-five cents.” On a trial by jury the defendant was found “guilty of the offense charged in the indictment in this cause, and that his true age is now 36

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152	35
153	152
150	273
154	249
154	262
155	294
150	273
160	310
150	273
161	364

Vancleave v. The State.

years." Judgment followed upon the verdict according to the act approved March 8th, 1897, known as the "Indeterminate Sentence Law," applicable to male offenders guilty of a felony other than treason or murder in the first or second degree, and 30 years of age or over (Acts 1897, p. 219), the court having overruled his motion for a new trial.

Error is assigned by the appellant upon numerous rulings, many of which have been waived by failing to discuss them. We will notice such of them as have not been waived.

The first of such rulings urged as error is overruling appellant's motion for a *venire de novo*. The ground on which this motion is urged is that the indictment charges both robbery and larceny, and the verdict fails to show of which it is that the jury find the defendant guilty. A charge of larceny is always included in a charge of robbery, which latter crime it is practically conceded is properly charged in the indictment. *Rains v. State*, 137 Ind. 83, and authorities there cited.

A general verdict of guilty as charged in the indictment is a verdict that the defendant is guilty of the crime or offense or offenses charged in the indictment, and such a verdict is not defective. 1 Bish. Crim. Pro., section 1015a, 3 and 4, and authorities cited. Therefore the circuit court did not err in overruling appellant's motion for a *venire de novo*.

Another objection urged to the verdict is that the act referred to above, authorizing such a verdict, is unconstitutional and void, for the same reasons urged against the constitutionality of the Reformatory Act in *Miller v. State*, 149 Ind. 607. On the authority of that case, and on the authority of *Wilson v. State*, *post*, 697, upholding the constitutionality of the act now in question, we hold it constitutional and valid.

Vancleave v. The State.

The next objection urged under the motion for a new trial is that the verdict is contrary to, and not supported by the evidence. The principal argument of appellant's counsel in support of this contention is not that there was not any evidence to support a finding of guilty, but that the appellant's opposing evidence and the circumstances were sufficient to overcome the State's evidence, and hence that the jury erred in weighing it; and we are urged to correct the error of fact into which it is claimed that the jury had fallen. That we cannot review the evidence on appeal, where that part of it tending to support the verdict is legally sufficient, even when the opposing evidence may seem to us to outweigh it, has been decided so often by this court that it seems passing strange that counsel will ignore it, and assume that it may be, when we have decided we cannot review the evidence for the thousandth time, we may conclude to overrule all those cases. See *Dcal v. State*, 140 Ind. 354, and cases there cited. But, even if we were permitted to re-weigh the evidence, it does not seem to us that the jury erred in weighing it.

The next point made under the motion for a new trial is that the trial court erred in permitting the State to ask the appellant while on the witness stand, as a witness in his own behalf, on cross-examination, the following question: "I will ask you if you were arrested on the charge of larceny, and convicted in this court at the March term, 1886?" Answer: "Yes; I was." Question: "I will ask you if you are not now under indictment and arrest for robbing Charles Keith?" Answer: "Yes, sir." No objection was urged on account of the fact that it was an offer to prove by parol what was a matter of record. But the objection is that such evidence was inadmissible, even though proved by the record. The court, however,

Collier et al. v. Collier et al.

told the jury that it was admitted only for one purpose, and its consideration by them must be confined to that purpose, and that purpose was to affect the credibility of appellant's testimony. For such a purpose such questions and answers in cross-examination, it is settled law, are competent and proper. *Parker v. State*, 136 Ind. 284, 288; *Bessette v. State*, 101 Ind. 85; *Blough v. Parry*, 144 Ind. 463, 481; *Shears v. State*, 147 Ind. 51. There was no error in permitting such cross-examination for such purpose.

The circuit court did not err in overruling the motion for a new trial. The judgment is affirmed.

COLLIER ET AL. v. COLLIER ET AL.

[No. 18,356. Filed April 8, 1898.]

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150 280

EVIDENCE.—*Omission of Proof Essential to a Recovery.—Appeal.*—

Where the party in whose favor judgment was rendered omitted proof essential to a recovery, that fact is no reason for reversal if the adverse party in his evidence supplied the omission. p. 277.

JUSTICE OF THE PEACE.—*Transcript of Judgment.—Certificate.*—The certificate to a justice's transcript was as follows: "I hereby certify that the above and foregoing is a true and correct copy, as appears of record on my docket, together with the costs taxed at," etc. *Held*, that the certificate was sufficient. pp. 277, 278.

From the Newton Circuit Court. *Reversed.*

Foltz, Spittler & Kurrie, T. B. Cunningham and Frank A. Comparet, for appellant.

Cummings & Darroch, for appellees.

HACKNEY, J.—This was a suit by Charles Collier against Elwood C. Collier, George Pierce, and others, to foreclose a real estate mortgage, executed by Elwood C. Collier and wife to said Charles Collier. Pierce, it was alleged in the complaint, claimed some interest in said real estate, which was adverse, but junior, to the mortgage, and he was made a defendant.

to answer as to any interest claimed by him. Pierce relied upon a purchase of the property under an execution issued upon the transcript of a judgment rendered before a justice of the peace against Elwood C. Collier, and filed in the office of the clerk of the circuit court.

An assignment of error calls in question the action of the trial court in sustaining a demurrer to the amended second paragraph of the answer of Pierce. No such pleading is found in the record, and cannot, therefore, present any question for decision. It is shown by the record that an answer in two paragraphs was filed; that a motion to separate the second paragraph into two paragraphs was filed and sustained; and that thereafter an answer in two paragraphs was filed as an original answer, and to all appearances for the purpose of obviating the ruling which required the second paragraph of answer, as first filed, to be separated.

The only other assignment discussed by counsel is that upon the overruling of the motion of Pierce for a new trial. The issues formed included a cross-complaint by Pierce to quiet his title under said purchase. The first contention, upon the motion for a new trial, is that the appellee rested his evidence without proof to the allegation that appellant claimed an interest in the real estate adverse to the mortgage. The case, so far as questions upon the evidence are concerned, comes to this court upon the whole evidence and, if the appellee omitted proof essential to a recovery, that fact is no reason for reversal, if the appellant, in his evidence, supplied the appellee's omission, as was the case here.

The next contention is that the trial court erred in excluding, as evidence, the transcript of the justice of the peace upon which the execution supporting

Collier *et al.* v. Collier *et al.*

appellant's deed was issued. The objection sustained by the trial court was that the certificate of the justice, attached to the transcript, was not sufficient. It was as follows: "I hereby certify that the above and foregoing is a true and correct copy, as appears of record on my docket, together with the costs taxed at," etc., dated and signed. That which preceded the certificate exhibited a complete proceeding and judgment against Elwood C. Collier, and the certificate impresses it as a "true and correct copy."

The statute, section 624, Burns' R. S. 1894, requires the justice "to make out and certify a true and complete transcript of the proceedings and judgment." This statute does not prescribe the form of certificate to be made in such cases. It but requires that the justice shall "certify a true and complete transcript of the proceedings and judgment." "A true and correct copy" is the equivalent of "true and complete transcript." A copy is a transcript and it could not be "true and correct" if it were incomplete. *Walker v. Hill*, 111 Ind. 223; *Anderson v. Ackerman*, 88 Ind. 481. Under an early statute, R. S. 1838, p. 375, requiring the certification of a transcript of the proceedings and judgment, to bind real estate, it was held that a certificate that "the above" is "a true transcript from my docket" was sufficient. *Wiley v. Forsee*, 6 Blackf. 246. See, also, in support of this conclusion, *Whitney v. Mills*, 6 Blackf. 545; *Ward v. Hazlerigg*, 7 Blackf. 46; *Brown v. McKay*, 16 Ind. 484.

The court, in *Wiley v. Forsee*, *supra*, looked into the record, and saw that that certified as a "true transcript" was complete, and indulged no presumption that it was less than a complete copy. It was error for the lower court to exclude the evidence, and the judgment is reversed.

The Goshen Woolen Mills *et al.* v. The City Nat'l Bank of Goshen.

THE GOSHEN WOOLEN MILLS COMPANY ET AL. v. THE
CITY NATIONAL BANK OF GOSHEN.

[No. 18,176. Filed Jan. 27, 1898. Rehearing denied April 8, 1898.]

RECEIVERS.—Appointment.—It is not necessary in an appeal from an interlocutory order appointing a receiver to inquire into the sufficiency of the complaint as the foundation of a cause of action. It is enough if, from the verified pleadings and affidavits, there was sufficient ground shown for the appointment of a receiver. *p.* 285.

SAME.—Appointment.—Fraud.—Under the provisions of section 1236, Burns' R. S. 1894 (1222, R. S. 1881), that a receiver may be appointed where the property in controversy is in danger of being materially injured, where a corporation is insolvent or in imminent danger thereof, the court may appoint a receiver for property assigned by the corporation for the benefit of certain creditors, although no fraud is shown in such assignment, if, in the opinion of the court, such action is necessary to secure ample justice to the parties. *pp.* 285, 286.

SAME.—Appointment.—Interest of Petitioner.—A receiver will not be appointed on petition of one whose complaint shows no right of ultimate recovery in the action. *p.* 286.

SAME.—Appointment.—Interest of Petitioner.—Assignment for Benefit of Creditors.—Where a trust deed for certain creditors provides that any surplus arising from the sale of the property after the satisfaction of such creditors shall be paid to grantor, a general creditor has such an interest as to give him the right to apply for a receiver, where there is a possibility that there will be a surplus. *pp.* 286, 287.

From the Elkhart Circuit Court. *Affirmed.*

J. M. Van Fleet and *V. W. Van Fleet*, for appellants.
Francis E. Baker and *Charles W. Miller*, for appellee.

HOWARD, C. J.—This is an appeal from an interlocutory order appointing a receiver. The action was brought by the appellee to recover a debt alleged to be due by the appellant woolen mills company, also to set aside as fraudulent a trust deed given by said company to its co-appellant Harry L. Arnold, and to appoint a receiver to take possession of the property

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156	582
150	279
157	298
157	300
150	279
161	462
150	279
168	628
150	279
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The Goshen Woolen Mills et al. v. The City Nat'l Bank of Goshen.

of said company, and sell the same, and apply the proceeds in payment of the debts due appellee and the other creditors of said company.

It is contended by appellants that the facts alleged in the verified complaint and supplemental complaint, together with those stated in the affidavits filed in support thereof, are not sufficient to justify the appointment of a receiver. From the complaint and affidavits it is made to appear that at the institution of the suit, January 27, 1897, the appellant company was indebted to the appellee on a promissory note, then past due, in the sum of \$4,303.13; that the said company was insolvent at the time of the maturity of the note, and has been insolvent ever since, being indebted to the amount of \$25,000.00, which is all past due, and which the company is unable to pay, and that all its property, except in case an exceptional purchaser could be procured, would not bring, at a fair cash value in the market, to exceed \$16,000.00; that on January 9, 1897, the appellants Edmund R. Kerstetter, James L. Kerstetter, Alice M. Kerstetter, Susan E. Kerstetter, and Edward Shilling, were the directors of the appellant company; and that on said day Edmund R. Kerstetter and James L. Kerstetter, president and secretary, professing to act for the company, executed to their co-appellant Arnold the deed of trust referred to, purporting to convey to him all the property of the company, in trust to sell the same within twelve months, and pay the proceeds as follows: (1) All taxes, assessments, and the expenses of the trust; (2) all debts due for work and labor; (3) an unliquidated debt due for attorneys' fees; (4) a note for \$3,500.00 due Susan E. Kerstetter; (5) two notes for \$3,034.38 due the Elkhart National Bank; (6) six notes due to different corporations and individuals, amounting to \$9,130.88; (7) any funds remaining to be paid to the

The Goshen Woolen Mills *et al. v. The City Nat'l Bank of Goshen.*

company. The right to appoint a new trustee in case the one so appointed should fail to act, or should resign or be removed, was reserved in the deed. It is further charged that the acknowledgment of said deed, and the placing the same on record by the notary acknowledging the same, were fraudulent, by reason of the interest of the notary in the said instrument; that said deed was executed for the purpose of cheating, hindering, delaying and defrauding the appellee and other creditors of the appellant company; that it was executed without any consideration moving to said grantor; that it was executed without authority from the board of directors of the company; that said directors were not in a position to authorize the execution of the deed, for the reason that they were each and all interested in said instrument adversely to said appellant company; that in addition to said directors there are other stockholders of said company, and such other stockholders were not consulted with regard to the execution of said deed, nor did they know of such execution until long afterwards; that the said Edmund R. Kerstetter and James L. Kerstetter are brothers; that Susan E. Kerstetter is the wife of James L. Kerstetter; that Alice M. Kerstetter is the wife of Edmund R. Kerstetter; that Edward Shilling is the confidential man of James L. Kerstetter; that the said Harry L. Arnold is a nephew of Edmund R. Kerstetter, and a clerk in the appellant Elkhart National Bank, under the said Edmund R. Kerstetter, who is cashier of said bank; that the said directors, Edmund R. Kerstetter, James L. Kerstetter, Susan E. Kerstetter, and Edward Shilling fraudulently attempted in said instrument to create preferences in their own favor at the expense of appellee and other *bona fide* creditors of said appellant company, the particulars of their interests in such

The Goshen Woolen Mills *et al.* v. The City Nat'l Bank of Goshen.

preferences being set out; that there are debts of said company outside of the debts named in said instrument to the amount of \$10,000.00; that the said Alice M. Kerstetter is not a *bona fide* director of said company, certain shares of stock having been conveyed to her without consideration on January 5, 1897, by her husband, Edmund R. Kerstetter, so that the directory should be under the control of Edmund R. and James L. Kerstetter; that long after the execution of said deed, to wit, on January 25, 1897, James L. Kerstetter, as secretary, wrote upon the records of said company what purport to be minutes of various meetings of directors, for the purpose of having it appear that such meetings had been held to authorize the execution of such written instrument, when in truth and in fact no such meetings were held; that all of the property and business of said woolen mills company continue in the control of James L. Kerstetter, who manages the same as he did before the execution of said deed; that since May, 1893, said mill has been practically idle all the time; that Edmund R. Kerstetter and Harry L. Arnold, the trustee, reside in, and their business is at Elkhart, and by reason of Arnold's subjection to Edmund R. Kerstetter he will do whatever Edmund R. Kerstetter directs; that James L. Kerstetter and Edmund R. Kerstetter are each wholly insolvent, and the said Arnold and Shilling are not believed to be financially responsible; that James L. Kerstetter and Edmund R. Kerstetter, with Arnold and Shilling, are proceeding to convert the assets of said company into cash, and apply the same to their own use under the pretense that the same is for back salaries and current pay for their services; and, if not restrained, they will continue to convert the same to their own use, as contemplated in said written instrument; and, if they are allowed to re-

The Goshen Woolen Mills *et al.* v. The City Nat'l Bank of Goshen.

main in control of said property until the determination of this suit, all of the property and assets of the company will be beyond the reach of the appellee and any other creditors of said company; that on January 28, 1897, and after having been notified of the bringing of this action, the said Kerstetter, Arnold, Shilling, and their attorneys, for the purpose of further hindering, cheating, and defrauding appellee and other *bona fide* creditors, conspired together to confess, and did confess judgment in favor of Susan E. Kerstetter and the Elkhart National Bank upon notes in their favor referred to in said deed of trust.

It is stated in the affidavit of the president of the appellee bank that on January 5, 1897, at a meeting of the directors of said bank, Edmund R. Kerstetter was present and demanded that appellee should bind itself not to take any action for the collection of its debt for one year, in which event the other creditors would make the same agreement, and that, if appellee did not accept the terms so stated, the appellee would regret it, "that he had never done anything crooked yet, but that the directors of plaintiff should take notice that people had done such things;" that his appearance in making this and other like statements was threatening and vindictive.

One of the stockholders of the appellant company said, in his affidavit, that he had repeatedly gone to James L. Kerstetter, the manager of said company, and remonstrated with him for the manner in which said mills were carried on; that he believed the Goshen Woolen Mills would do a profitable business if they manufactured such goods as the trade demanded, instead of trying to force upon people goods that were out of date and unsalable, but that said manager at such times became angry and would have no conversation with affiant; that, in a conversation with Ed-

The Goshen Woolen Mills et al. v. The City Nat'l Bank of Goshen.

mund R. Kerstetter, the latter admitted that it would be better if his brother could be induced to manufacture such staple cloths as were in demand, instead of running the mills on flannels; that affiant had frequently endeavored to obtain from the officers of the company a statement of the condition of its business, and information as to the times of meeting of the company, but had been unable to do so; that, during the time James L. Kerstetter has been an officer of the company, he has continued said Shilling as salesman on a salary, but that said Kerstetter has himself spent the greater part of his time at his home, or sitting around various stores in the city, and that Shilling spent his time in the warerooms, waiting for people to come and buy goods; that, when affiant spoke to Edmund R. Kerstetter of having heard that the appellee bank would not extend the time of payment of its debt, the said Kerstetter replied "that they knew better than not to extend it, because, if they didn't, he would show them a trick with a hole in it." One of the attorneys for the appellee stated in his affidavit that "on January 26, 1897, James L. Kerstetter stated to him that he and Shilling were to continue the business the same as before the trust deed was made, except that they were under the nominal direction of Arnold; that the preference in the deed to work and labor unpaid was to secure himself and Shilling for back pay."

While many of these allegations and statements may not be controlling as to the right of appellee to have a receiver appointed, yet we are of opinion that there were sufficient, such allegations and statements, which, if believed by the court, justified the appointment of the receiver. "It was for the judge to whom the application was made," as said in *Galloway v. Campbell*, 142 Ind. 324, "to determine the probable

The Goshen Woolen Mills *et al.* v. The City Nat'l Bank of Goshen.

facts from these several pleadings and affidavits. If the statements in the complaint and application, and in the affidavits in their support, are correct, it would seem that the appointment was justified." It was there also said, citing *Bitting v. Ten Eyck*, 85 Ind. 357, that "the appointment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it."

It is not necessary, or even proper, on this appeal, to inquire into the sufficiency of the complaint, as the foundation of a cause of action against appellants. It is enough if from the verified pleadings and the affidavits there was sufficient ground shown for the appointment of a receiver to take charge of the property of the woolen mills during the pendency of the action. In section 1236, Burns' R. S. 1894 (1222, R. S. 1881), clause 3, it is provided that a receiver may be appointed when the property in controversy is in danger of being "materially injured;" in clause 5, of the same section, when a corporation "is insolvent, or is in imminent danger of insolvency;" and in clause 7, when, in the discretion of the court or the judge in vacation, "it may be necessary to secure ample justice to the parties." From the abstract of the complaint and affidavits given above, it is clear that, under these specifications of the statute, there were sufficient and pertinent allegations and statements authorizing the appointment of a receiver.

It may be, as counsel for appellants ably and strenuously argue, that the trust deed does not disclose fraud; and, as held in *McFarland v. Birdsall*, 14 Ind. 126; *New Albany, etc., R. R. Co. v. Huff*, 19 Ind. 444; *Dessar v. Field*, 99 Ind. 548, and *Hays v. Hostetter*, 125 Ind. 60, that a conveyance of land by an insolvent

The Goshen Woolen Mills et al. v. The City Nat'l Bank of Goshen.

debtor to a trustee for the benefit of certain creditors, to the exclusion of others, even, as here, with a reservation of the surplus to the debtor, may not be fraudulent as to the excluded creditors. But see *Thompson v. Parker*, 83 Ind. 96. Fraud, however, is a question of fact, to be determined as such in each case. That there are badges of fraud here shown, is unquestionable. Whether such fraud will be ultimately established, is yet to be determined. But even if the deed of trust should, in the end, be upheld, and no fraud be found, still the allegations as to material injury to the property, and those as to the insolvency of the corporation and the want of business capacity and financial responsibility on the part of those left in charge of its affairs by the nominal trustee, would justify the court in appointing a receiver, "to protect the property from material injury, and to secure ample justice to the parties."

Nor will it do to say that, if the trust deed should ultimately be held good, appellee can have no interest in the property of the company, and, consequently, no right to ask for a receiver, for the reason that the preferences named in the deed amount to as much as, or more than, the alleged value of the property. It is true that a receiver will not be appointed on petition of one whose complaint shows no right of ultimate recovery in the action. The applicant must, of course, have a real interest in the controversy.

The complaint before us does indeed state that the property of the appellant company would not bring more than \$16,000.00 in the open market, unless an exceptional purchaser should be found. But such a purchaser might be found, one having a desire to engage in the woolen business, and willing to pay the cost of erecting and furnishing mills such as those of the appellant company. More than this, the deed

Singer, Administrator, v. Tormoehlen *et al.*

itself makes provision for such surplus over the preferences. It is evident, therefore, that, in any event, whether the deed be held good or not, the appellee is interested in the appointment of a receiver. Judgment affirmed.

SINGER, ADMINISTRATOR, v. TORMOEHLLEN ET AL.

[No. 18,231. Filed April 19, 1898.]

APPEAL.—Assignment of Errors.—New Trial.—Errors that would form the basis for a new trial cannot be assigned for the first time in the Supreme Court, but should have been assigned in the lower court as reasons for a new trial. *p. 286.*

SAME.—Assignment of Error.—The appellant must, by proper assignments, specify with reasonable certainty the rulings of the lower court which he desires reviewed; and no error, not so assigned, can be made available. *p. 290.*

SAME.—Assignment of Error.—Record.—Where the record does not contain a demurrer, the overruling of which is alleged as error, it cannot be considered on appeal. *p. 291.*

SAME.—Motion to Enlarge General Finding.—Where there has been no request for a special finding of facts, the court cannot be required to restate and enlarge its general finding so as to make a statement of facts relative to a particular question involved. *p. 291.*

SAME.—Assignment of Error.—Appellant assigned as error that one John W. Tormoehlen was excluded as a witness. The part of the transcript cited by appellant's brief as supporting the alleged error, disclosed that one "John Turmail," and not "John W. Tormoehlen" was offered as a witness. *Held*, that the alleged error was not reviewable. *p. 292.*

SAME.—Witness Not Permitted to Testify.—Record.—Where the record does not disclose that the trial court was informed what was sought to be proved by a witness who was not permitted to testify, there is no available error. *p. 292.*

From the Jackson Circuit Court. *Affirmed.*

Burrell & Branaman, for appellant.

O. H. Montgomery, Applewhite & Applewhite and *W. H. Endebrock*, for appellees.

JORDAN, J.—Action by appellant in the lower court as the administrator of Frederick Tormoehlen against

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Singer, Administrator, v. Tormoehlen et al.

the appellees, some of whom are the heirs of appellant's decedent, and others are creditors of George F. Tormoehlen. The purpose of the suit was to recover a judgment against said George F. Tormoehlen upon three promissory notes executed by him to appellant as administrator of said estate, and to invoke the equity powers of the court in declaring the judgment recovered to be a lien on certain lands situate in Jackson county, Indiana, which the said George F. acquired by descent from his father, appellant's intestate. Said lien the court was asked to adjudge to be a prior and superior one to the liens held by certain ones of the appellees herein, who held mortgage and judgment liens against the same lands.

An amended complaint was filed by appellant, and numerous answers by the several defendants were addressed to this complaint, wherein it was alleged, among other things, that the notes in suit were executed without any consideration whatever. Several of the appellees who held claims against George F. Tormoehlen, secured by mortgages on the lands in controversy, filed separate cross-complaints, whereby they sought to secure foreclosure of such liens. Issues were joined between the parties on these several pleadings, and a trial resulted in the court finding that the notes in suit had been executed to appellant by George F. Tormoehlen without any consideration whatever, and finding also in favor of the appellees upon the issues tendered by their several cross-complaints; and, over plaintiff's motion for a new trial, the court rendered its judgment that he take nothing under his action, and further ordered and decreed that the real estate in dispute be sold, and directed the manner in which the proceeds arising upon such sale should be applied in satisfaction of the several liens and claims held by the appellees.

Singer, Administrator, v. Tormoehlen *et al.*

Appellant has assigned in this court ten separate grounds as alleged errors on the part of the lower court: First. In overruling appellant's demurrer to the second paragraph of separate answer of appellees. Second. In overruling motion of appellant to strike out cross-complaint. Third. In overruling appellant's demurrer to cross-complaint. The fourth assignment relates to a ruling of the court in refusing to permit a certain named witness to testify on the trial. The fifth, to rejecting the evidence of a certain mentioned witness. The sixth is in reference to excluding the evidence of another witness in relation to the consideration of one of the notes in suit. The seventh alleges that the finding of the court is contrary to law and is not sustained by the evidence. The eighth is based upon the decision of the court in overruling appellant's motion to restate the facts in its finding so as to show advancements made to George F. Tormoehlen by the appellant's decedent. Ninth. Overruling appellant's motion for judgment against George F. Tormoehlen on his default on the complaint. Tenth. Overruling appellant's motion for a new trial.

We can consider no questions which appellant seeks to have reviewed under his fourth, fifth, sixth and seventh specifications, because it is evident that these alleged errors would form a basis for a new trial, and therefore cannot be assigned independently as errors for the first time in this court, but in order to be available on appeal they should have been assigned in the motion in the lower court as reasons for a new trial. This rule is one well affirmed and settled. Elliott App. Proc., section 347.

The first assignment of error, when applied to and tested by the record, is too indefinite and un-

Singer, Administrator, v. Tormoehlen *et al.*

certain. An examination of the record discloses that there were numerous separate answers filed by certain appellees, which contain a second paragraph, and equally as many demurrers filed by appellant to second paragraphs of separate answers, all of which were overruled by the court. Consequently, under such circumstances, appellant's first assignment does not in any manner serve to apprise us as to which particular answer it was intended to apply, and we are left to conjecture or surmise to which one it refers. When an effort is made to apply an assignment of error to the record, which must afford it support, if it thereby becomes, or is rendered so indefinite that it cannot with any reasonable certainty be made applicable to the record, under such circumstances, the appellant must necessarily fail to have the questions considered which he seeks by such assignment to present. *Bolin v. Simmons*, 81 Ind. 92; *Peters v. Banta*, 120 Ind. 416; *Robbins v. Masteller*, 147 Ind. 122, and authorities there cited; *Baldwin v. Sutton*, 148 Ind. 591; *Collier v. Collier*, *ante*, 276; *Elliott's App. Proc.*, section 325. It follows, therefore, that the first assignment of error is not available for the reason that under the condition of the record we cannot ascertain therefrom the answer to which it refers.

The second and third specifications are open to the same objections urged against the first. It is shown by the record that at least three separate cross-complaints were filed by different ones of the appellees. The part of the transcript to which we are referred by counsel for appellant as disclosing the motion, and the court's ruling thereon upon which it is sought to base the second assignment, shows that the plaintiff filed a motion to strike out and reject the cross-complaint of the defendants, Empson, Mason, Johnson, Hancock, and "others." The motion which is shown

by the record to have been overruled is denominated in the entry as a "motion to strike out each paragraph of the cross-complaint herein." It is evident that the second assignment of error, and the record do not consist with each other and, under the authorities above cited, this assignment is therefore of no service to appellant.

In regard to the third assignment, we find that the record shows that plaintiff demurred to the "cross-complaint of P. B. Mathiason *et al.*," and subsequently filed a demurrer "to the cross-complaint" which the court overruled, and plaintiff excepted, but this latter demurrer does not appear in the transcript. It is so evident under this condition of the record that appellant must fail in his effort to present any question under the third assignment that nothing more need be said in respect thereto.

Appellant complains, by his eighth specification, of the action of the court in denying his motion asking that the facts be restated so as to show advancements made to George F. Tormoehlen. There was no request made by any of the parties to this action for a special finding of facts, and the finding made by the court is a general one; and under such circumstances we recognize no legitimate reasons, neither do counsel for appellant point out any, for requiring the court to enlarge its general finding so as to make a statement or finding of facts relative to the advancements mentioned.

The tenth assignment in regard to overruling appellant's motion for "judgment against George F. Tormoehlen on his default on the complaint" presents no question, for the principal reason that no such motion as the one specified appears in the record. There is a motion to the effect that the court restate its finding as to George F. Tormoehlen, etc., but this is a motion quite different from the one assigned.

Singer, Administrator, v. Tormoehlen *et al.*

The next and last assignment of error discussed by appellant is that the court erred in overruling his motion for a new trial. The only reasons assigned in this motion that can be said to have any legitimate place therein are those which allege or specify that the decision of the court is not sustained by sufficient evidence and is contrary to law, and that the court erred in excluding John W. Tormoehlen as a witness.

This last assignment in the motion for a new trial is not available. An examination of the part of the transcript to which we are cited by appellant in his brief as supporting this alleged error discloses that one "John Turmail," and not "John W. Tormoehlen," was offered as a witness on the trial, and, upon objections being made by the defendants, this witness was not permitted by the court to testify. The witness named and specified in the motion for a new trial does not correspond with, nor answer to, the one named in that part of the record to which we are referred, and under such circumstances we cannot review the alleged error. Again, if the assignment as specified in the motion for a new trial could be applied to the record, it would not be available for the reason that it is not disclosed that the trial court was informed as to what appellant expected or proposed to prove by the witness. *Cox v. Dill*, 85 Ind. 334; *Bauer v. City of Indianapolis*, 99 Ind. 56, and cases there cited; *Shepard v. Goben*, 142 Ind. 318.

We have carefully read and considered the voluminous evidence in this cause, and, while, as is generally the case, there is some conflict therein, still it sufficiently sustains the finding, and justified the court in rendering judgment against appellant. There is no available error shown, and the judgment is therefore affirmed.

Hicks v. The State.

HICKS v. THE STATE.

[No. 18,427. Filed April 19, 1898.]

CRIMINAL LAW.—*Punishment Increased.—Ex. Post Facto Law.*—Punishment may be lessened, but it cannot be increased, by a statute enacted after the commission of the offense. p. 294.

SAME.—*Bigamy.—When the Crime Does Not Come Within the Purview of Indeterminate Sentence Law.*—The word "punishable" as used in section 1, of the Indeterminate Sentence Law (Acts 1897, p. 219), applies only to those crimes which actually are, and not which may be, punished by confinement in the State prison, and where a person found guilty of bigamy does not, in the opinion of the court or jury trying the case, deserve punishment greater than a fine and imprisonment in the county jail, such case does not come within the purview of the Indeterminate Sentence Law. pp. 297-299.

From the Floyd Circuit Court. *Affirmed.*

Kelso & Kelso, for appellant.

W. A. Ketcham, Attorney-General, *W. C. Utz*, *Merrill Moores*, *A. E. Dickey* and *W. M. Aydelotte*, for State.

MCCABE, J.—The appellant was indicted in the Floyd Circuit Court for bigamy. On a trial of the charge by the court without a jury, he was found guilty, and his punishment fixed at a fine of one dollar, and confinement in the jail of the county for three months, and judgment was rendered accordingly. The record and assignment of errors are sufficient to present for decision the question discussed by appellant's counsel, namely, whether the law by virtue of which it is claimed by them appellant was convicted was not an *ex post facto* law as to appellant's offense, and therefore unconstitutional. The offense was committed, as shown both by the indictment and appellant's own special plea of confession and avoidance, on April 8, 1896. But the indictment was not returned until May 15, 1897, after the indeterminate sentence law

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Hicks v. The State.

of 1897 took effect. Acts 1897, p. 69. Appellant's learned counsel contend that that law changed the penalty prescribed for all felonies other than treason and murder in the first and second degrees, and hence as to the offense here charged, such punishment is *ex post facto*, and violative of the constitution. Punishment may be lessened, but it cannot be increased constitutionally by statute enacted after the commission of the offense. *Dinckerlocker v. Marsh*, 75 Ind. 548; *Strong v. State*, 1 Blackf. 193; *Commonwealth v. Mott*, 21 Pick. 492; *State v. Arlin*, 39 N. H. 179; *Mullen v. People*, 31 Ill. 444. Assuming that the change effected in the punishment of that class of felonies falling within the indeterminate sentence law, by virtue thereof is such as to render it violative of the constitution as to offenses committed before its enactment and prosecuted thereafter, and assuming that the offense here involved falls within that law, appellant's counsel, to make sure of no escape from the conclusion they seek, go into an elaborate and mysterious, if not ingenious, argument to the effect that there is no saving clause or statute left standing and in force by which such an offense, committed before the enactment of the law in question, as in the case here, can be thereafter prosecuted and punished according to the old law. We find it quite unnecessary to go into an examination of the abstruse and incomprehensible questions so extensively urged upon our attention, because the assumptions of counsel above mentioned we find have no foundation whatever. It may be safely conceded that both the indeterminate sentence law and the reformatory act have the effect of modifying or changing the punishment of that class of felonies falling within their respective provisions, without affecting the question here involved. And assuming, without deciding, that the change in such punishment

Hicks v. The State.

is of such a character as to offenses committed before their enactment respectively, as to make the same *ex post facto*, still that cannot affect the question here involved, unless the felony here involved falls within the provisions of the indeterminate sentence law as appellant's counsel have erroneously assumed that it does, or the reformatory act. Section 2075, Burns' R. S. 1894 (1889, Horner's R. S. 1897), defines bigamy and prescribes the punishment of imprisonment "in the state prison not exceeding five nor less than two years, or be fined not exceeding one thousand dollars, and be imprisoned in the county jail not less than three nor more than six months." This is a felony according to our statutory classification of public offenses. Because it is provided by the code of criminal procedure that: "All crimes and public offenses which may be punished with death or imprisonment in the state prison shall be denominated felonies, and all other offenses shall be denominated misdemeanors." Section 1642, Burns' R. S. 1894 (1573, Horner's R. S. 1897). Appellant's counsel in reaching the assumption that this case falls within the indeterminate sentence law, have assumed, without any foundation whatever, that the appellant was over thirty years of age. There is not a thing in the record showing what the age of appellant was when he was convicted. Without a finding by the court or jury trying the facts what the age of the accused is, there is no means of knowing whether the case falls within the provisions of the indeterminate sentence law or the reformatory act, if it were otherwise within the purview of either, because the former is applicable only to male offenders thirty years of age or over, while the latter exclusively applies to male offenders between sixteen and thirty years of age. So that we must determine whether the crime of which appellant was convicted falls within

Hicks v. The State.

the purview of either act. Evidently the trial court was of the opinion that it did not fall within either or the court would have found what appellant's age was. Evidently the legislature did not intend to include within the indeterminate sentence law or the Indiana reformatory act any felony where adequate and proper punishment is less than imprisonment in the State prison, because otherwise they must have intended, in cases like the present, to substitute imprisonment in the State prison or the Indiana reformatory for such felonies as may be adequately punished by a few days in the county jail and some small fine, such as, in this case, one dollar fine and three months in the county jail. To hold that the legislature intended to substitute the severer punishment of a penitentiary sentence for a jail sentence, in cases deserving no higher or severer punishment than such jail sentence and a fine, would be in conflict with the reformatory character pervading both acts, and the general spirit of both acts. To say that the intent of the act is to reform offenders by sending them to the penitentiary instead of the jail, where formerly they would have gone, is to accuse that body of a lack of common sense. The first section of the indeterminate sentence law reads thus: "That whenever any male person thirty years of age or over, shall be on trial for any felony, which is punishable by imprisonment in the state's prison, except treason, and murder in the first and second degrees, the court or jury trying said cause shall ascertain only whether or not the person is guilty of the offense charged; if more than one offense is charged, then it shall be found by such court or jury trying such person as to which of such offenses such person is guilty, if of either, and of which such person is not guilty, if of either. Instead of pronouncing upon such person a definite time

Hicks v. The State.

of imprisonment in the state prison for a fixed term, after such finding or verdict, the court trying said cause shall pronounce upon such person an indeterminate sentence of imprisonment in a state's prison for a term, stating in such sentence the minimum and maximum limits thereof, fixing as the minimum time of such imprisonment the term now or hereafter prescribed as the minimum imprisonment for the punishment of such offense, and as the maximum time, the maximum time now or hereafter prescribed as a penalty for the commission of such offense." The meaning of the first clause in the section is controlled by the meaning of the word "punishable." And that clause largely controls the meaning of the whole section. The word "punishable" is defined by Webster to mean deserving of or liable to punishment. If the language had been as in the section just quoted classifying offenses, namely, "all crimes which may be punished with * * * imprisonment in the state prison" we should have a very different question before us. But the meaning of the sentence is as if the legislature had said that whenever any male person thirty years of age or over, shall be on trial for any felony which deserves punishment by imprisonment in the State prison, or which is a necessary part of the punishment of his crime, except treason and murder in the first and second degrees, the court or jury trying the cause shall, etc. That would make the section include all that class of felonies where imprisonment in the State prison is a necessary part of the punishment prescribed, and a part of the class where, as in the case before us, such imprisonment in the discretion of the court or jury trying the case may be imposed, namely, that part of that class where the court or jury trying the case deem the offense proved under the circumstances deserving of punishment

Hicks v. The State.

in the State prison. But the other part of the class, namely, such as the one before us where the jury or court trying the case do not deem the offense of such malignancy as to deserve or require imprisonment in the State prison, does not fall within the purview of the section just quoted. This view is further strengthened by the fact that in no part of the section, and especially that part following the word "punishable," is provision made as to that part of the punishment for any felony which may, in the discretion of the jury or court trying the case, consist of a fine and imprisonment in the county jail instead of imprisonment in the State prison, or the Indiana reformatory. Liability to such punishment under the various felony statutes cannot be abrogated unless done so expressly, or by legislation absolutely repugnant thereto. And this we have seen has not been done by the indeterminate sentence law. This principle was, in effect, ruled in *Miller v. State*, 149 Ind. 607. That was a prosecution for burglary and larceny under the reformatory act, there being nothing said in said act about other penalties and punishments than imprisonment in the State prison. It was there said: "The judge now fixes not only the punishment as to imprisonment, but as to all other penalties prescribed by the section of the criminal code with the violation of which the defendant was charged. In this case, the court ought to have adjudged as part of the punishment that appellant be disfranchised and rendered incapable of holding any office of trust or profit for some determinate period." But in cases like the one before us, if tried by a jury the court ought to instruct them, if, in their opinion the offense was not deserving of punishment by imprisonment in the State prison they should proceed to return a verdict precisely as if the indeterminate sentence law or the reformatory act had never

Meredith v. Meredith.

been passed. The court trying this case proceeded just as if the acts in question had never been passed. And that was right, if the court thought imprisonment in the State prison was greater punishment than the offense proved, under all the circumstances disclosed by the evidence deserved. The law presumes that the trial court decided correctly until the contrary is made affirmatively to appear in the record. The contrary does not appear to the presumption that the court inflicted only a fine and a jail sentence because it was of opinion that a penitentiary sentence was greater punishment than the offense proved under all the circumstances disclosed by the evidence deserved. Hence the class of felonies to which this case by the decision of the trial court is made to belong does not fall within the purview of the indeterminate sentence law. And for the same reason it does not fall within the provisions of the reformatory act. Therefore none of the questions so elaborately discussed in the briefs as to the effect of the indeterminate sentence law upon punishments and penalties of that class of felonies falling within its provisions committed before its enactment, and prosecuted thereafter, arises in the case now before us, and for that all sufficient reason we do not decide them. The judgment is therefore affirmed.

MEREDITH v. MEREDITH.

[No. 18,487. Filed April 20, 1898.]

CONSTRUCTIVE TRUST.—*Advancement to Wife by Conveyance to Husband.*—A conveyance to a husband by his wife's father, as an advancement to her, the transaction being free from fraud, does not create a constructive trust. 160 299
153 406
150 299
160 181

From the Jay Circuit Court. *Affirmed.*

Joseph H. Sell, J. J. M. LaFollette and O. H. Adair,
for appellant.

Meredith v. Meredith.

W. H. Williamson and Frank B. Jaqua, for appellee.

HOWARD, C. J.—This is an action by appellant to quiet her title to certain described real estate. In the complaint it is alleged, amongst other things, that in the year 1848 appellant's father, who was then the owner of the land in controversy, desired to, and did, give said land to her, in consideration of the fact that she was his daughter, and did charge her with said land as an advancement out of his estate; that, however, when he made the deed of conveyance for the same, to wit, August 8, 1848, he conveyed the same to Peter S. Meredith, her husband, who took the said title and held it for and in trust for her, and that each of said parties, to wit, herself, her husband, and her father, treated said land as having been given to her; that she and her husband lived on said land until his death; that her said husband made a will, which was duly probated after his death, by which he attempted to dispose of said land, and to give some interest therein to appellee, which devise was made without appellant's knowledge or consent, and creates a cloud upon her title to said land, and upon which appellee is setting up his title thereto; that said land was held by appellant's husband for her, and that he paid nothing therefor; that appellant took said land as an advancement out of her father's estate, and receipted for the same, and was charged therewith by her father. To this complaint the court sustained a demurrer for want of sufficient facts, and, appellant refusing to plead further, judgment was rendered against her.

The facts stated in the complaint, omitting the conclusions of the pleader, show simply that appellant's father made an advancement to her out of his estate by deeding the land in controversy to her husband. No express trust in the husband is shown, and it is

McIntosh et al. v. Zaring et al.

not contended that there was any implied trust, but counsel suggest, rather than argue, that there is a constructive trust shown. The very cases, however, cited by counsel show that there was no constructive trust. *Messall v. Tully*, 91 Ind. 96; *Wright v. Moody*, 116 Ind. 175. In counsel's brief, the following is cited from Judge Mitchell's opinion in the latter case: "The element essential to a constructive trust is, that fraud, either actual or constructive, must have intervened. Such trusts are raised by courts of chancery only in cases where it becomes necessary to prevent a failure of justice, and in most cases where there is no intention or agreement of the parties to create such a relation. *Cox v. Arnsmann*, 76 Ind. 210; *Tinkler v. Swaynie*, 71 Ind. 562; 1 Perry Trusts, section 166; 2 Pom. Eq. Jur., section 1044."

Nothing from which fraud can be implied is alleged in the complaint. On the contrary, it is shown that appellant knew that the deed was made to her husband. A father, moreover, may make an advancement to his daughter by deeding land to her husband; and this even without her knowledge or consent. There is no fraud, *per se*, in such a transaction; and if fraud actually exists in connection therewith, the same must be alleged and proved. *Baker v. Leathers*, 3 Ind. 558; *Hileman v. Hileman*, 85 Ind. 1; *Noe v. Roll*, 134 Ind. 115; *Lewis v. Stanley*, 148 Ind. 351. Judgment affirmed. **Monks, J.**, took no part in the decision of this case.

MCINTOSH ET AL. v. ZARING ET AL.

[No. 16.77. Filed January 27, 1898. Motion to retax costs sustained April 20, 1898.]

CONTRACT —*Joint and Several*.—A written contract by the terms of which three firms of attorneys are to undertake the legal work con-

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152	575
150	301
155	102
155	522
155	523
150	301
159	78
150	301
160	213
150	301
161	277
16	

nected with the contest of a will, and to receive a stipulated sum, one-third of which is to be paid to each firm, is, in effect, three several contracts. *pp.* 303-305.

PLEADING.—*Joinder of Plaintiffs in Action to Avoid Settlement.*—Three firms of attorneys had contracts with the same client by the terms of which several contracts the client was to pay a certain per cent. of the amount recovered. The cause was compromised, and by fraud the attorneys induced to accept a smaller sum in full settlement and discharge of the contract than was due them. *Held*, that the several firms might join in an action to avoid the settlement. *pp.* 305-307.

SAME.—*Action to Set Aside Settlement for Fraud.*—*Complaint.*—In an action to avoid a settlement because of alleged fraud, where the facts are stated entitling the plaintiff to such relief, and there is a general prayer for judgment and other proper relief, it is not necessary that the complaint contain a specific prayer that the settlement be set aside on the ground of fraud. *p.* 307.

SAME.—*Complaint.*—*Allegation of Partnership.*—A partnership is not alleged in a complaint by merely setting out a contract which had been signed by two of the plaintiffs in their firm name. *p.* 308.

JOINT CONTRACT.—*Action by Survivor.*—A contract by the terms of which it is agreed to pay a certain sum of money to two persons, is a joint contract as between such payees, and upon the death of one the right of action vests exclusively in the other. *p.* 309.

PLEADING.—*Defective Complaint.*—*Answer.*—*Practice.*—Where the grounds for demurrer do not appear on the face of the complaint, and defendant files answer, as provided by section 346, Burns' R. S. 1894, and issue is joined, and the proof establishes the truth of the answer, the complaint will be defeated in the same manner as if the facts of the answer appeared in the complaint, and a demurrer had been sustained to it. *p.* 311.

PRACTICE.—*Carrying Demurrer to Answer Back to Complaint.*—The right to carry a demurrer back to, and sustain it to, the complaint, depends entirely on whether the facts stated in the answer as an objection to the complaint, and admitted by the plaintiff's demurrer to said answer, can be considered as a part of the facts on which the complaint rests. *p.* 312.

PARTNERSHIP.—*Right of Survivor Upon Death of Partner.*—The right of action to collect the debts and assets due to a partnership where any of the partners are dead is vested by law exclusively in the surviving partner or partners. *p.* 312.

PLEADING.—*Complaint Not Stating Cause of Action as to All Plaintiffs.*—A complaint which does not state a good cause of action as to all, though it does as to some of the plaintiffs, is bad as to all, for want of facts sufficient to constitute a cause of action. *p.* 313.

McIntosh et al. v. Zaring et al.

JUDGMENT.—*Against Part of Plaintiffs or Defendants.*—*Statute Construed.*—Section 577, Burns' R. S. 1894, providing that "judgments may be given for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side," is not applicable to a question of pleading, but relates to a question of evidence and the manner of the rendition of judgment in such cases. p. 314.

APPEAL.—*Evidence When Not in Record.*—The evidence is not in the record where there is no showing that the longhand manuscript of the evidence was ever filed in the clerk's office. p. 316.

NEW TRIAL.—*When Judgment Rendered on Last Day of Term.*—Where judgment is rendered on the last day of the term of court, and a motion for a new trial is not made till the first day of the next regular term, a special term of the court having been held in the meantime, the motion for a new trial is too late. pp. 316, 317.

From the Jackson Circuit Court. *Reversed.*

Alsbaugh & Lawler, Applewhite & Applewhite, W. K. Marshall and F. Winter, for appellants.

Mitchell & Mitchell, Burrell & Branaman, W. P. Fishback and W. P. Kappes, for appellees.

MCCABE, J.—The appellees sued the appellants in the Washington Circuit Court to recover attorneys' fees upon a written contract. There was an answer filed leading to issues of law and fact. The venue was changed to the Jackson Circuit Court. A trial of the issues of fact in that court resulted in a verdict and judgment in favor of the plaintiffs in the sum of \$7,500.00 over appellants' motion for a new trial. Among the numerous errors assigned, are that the trial court erred in overruling a demurrer to the amended complaint for want of sufficient facts, that said complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the defendants' motion for a new trial. The contract sued on is as follows: "Ellen McIntosh and Andrew J. McIntosh her husband, have this day employed as counsel to contest the will of W. C. De Pauw, deceased, and to conduct all legal proceedings

McIntosh et al. v. Zaring et al.

for that purpose Friedly & Giles, of Bedford, Indiana, Zaring and Hottel, of Salem, Indiana, and C. L. & H. E. Jewett, of New Albany, Indiana. Suit to contest said will is to be filed immediately and prosecuted with all reasonable dispatch; and for all their services, of every kind performed in relation to said suit, said attorneys are to receive the following compensation, and no other, viz: For their services in the event that the will of W. C. DePauw is set aside and Ellen McIntosh declared entitled to share in his estate, a fee equal to twenty-five and a half ($25\frac{1}{2}$ per cent.) per cent. of the value of the estate which she shall thus be entitled to and does receive, and in the event of a compromise or adjustment before a trial is begun, whereby said will is allowed to stand, a sum equal to twelve and one-half per cent. ($12\frac{1}{2}$ per cent.) of the amount so received or stipulated to be received by her. They agree to pay said fee as follows: One-third to Friedly & Giles, one-third to Zaring and Hottel, and one-third to C. L. & H. E. Jewett. Ellen McIntosh. A. J. McIntosh. Friedly & Giles. C. L. & H. E. Jewett. Zaring & Hottel." The complaint alleged the performance of the contract on the appellees' part, and that the suit was compromised before trial by which appellant Sarah E. McIntosh received from the estate of said W. C. DePauw \$250,000.00, and that she fraudulently concealed the knowledge of the amount so received, and falsely represented to them that she had only received \$50,000.00 from said estate by said compromise; that relying on such representations the appellees had settled with and accepted from her $12\frac{1}{2}$ per cent. of \$50,000.00; that $12\frac{1}{2}$ per cent. on the excess received by her was still due them and remained unpaid, demanding judgment for \$30,000.00 and other proper relief. It is also alleged that Charles L. and Harry E. Jewett refused to join as

McIntosh et al. v. Zaring et al.

plaintiffs, and for that reason they were made defendants. They filed an answer disclaiming all interest in the suit. It is also alleged in the complaint that the appellees John A. Zaring and Milton B. Hottel were attorneys at law engaged in the practice of their profession under the firm name and style of Zaring & Hottel at the town of Salem, Washington county, Indiana, and that appellee Joseph Giles and the said George W. Friedly were at said date engaged in the practice of law in the city of Bedford, Lawrence county, Indiana. That after the performance of said services under said contract said George W. Friedly had died and the plaintiff Edith M. Friedly had been appointed administratrix *de bonis non* of the estate of said deceased. We hold that the contract sued on did not create a joint right of action in all the plaintiffs and hence the legal effect of the written contract was the same as if there had been three several and separate written contracts in favor of each of the three several firms or groups of attorneys and hence we hold that the contract itself did not create a joint right of action in said attorneys and cite the following cases supporting that conclusion. *Goodnight v. Goar*, 30 Ind. 418; *Tate v. Ohio, etc., R. R. Co.*, 10 Ind. 174; *Lipperd v. Edwards*, 39 Ind. 165; *Martin v. Davis*, 82 Ind. 41; *Harris v. Harris*, 61 Ind. 117; *Elliott v. Pontius*, 136 Ind. 641.

But there is an element in the complaint beyond the scope of the mere written contract that exerts an influence upon the right of the several obligees or payees therein to maintain a joint action thereon. That element is the allegation of fraud and misrepresentations of the defendants as to the amount Mrs. McIntosh had received from the estate of her father on the compromise, thereby inducing the said attorneys to

McIntosh et al. v. Zaring et al.

accept a much smaller sum in full satisfaction of the contract than they were entitled to under its terms according to the facts as they really existed. These allegations were material in order to enable the plaintiffs to avoid the settlement; because without avoiding that settlement none of them could recover on the contract. While neither one of the firms of attorneys in the contract mentioned were interested in either of the other firms recovering thereon, so as to enable them to join in a suit thereon, yet they were all interested in the other element which was essential to be established, without which neither of them could recover, namely, the fraud by which they had been induced to accept a smaller sum in full settlement and discharge of the contract than was really due them. In other words, they were all alike interested in avoiding the settlement. Our code provides: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided in this act." Section 263, Burns' R. S. 1894 (262, R. S. 1881). Another section of the code provides that: "When the action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy and a speedy satisfaction of his judgment, although such other matters fall within some other one or more of the foregoing classes." Section 281, Burns' R. S. 1894 (280, R. S. 1881). These sections of the code have the effect even to broaden the rule in equity in such cases. That rule was that several separate creditors might unite in an action where a part of the relief prayed was common to all. But the rule required them to first reduce their respective claims to judgments at law. However there were some exceptions to that rule. Where the debtor was dead or had absconded from the State

they could join in such action without obtaining judgments at law. *Kipper v. Glancey*, 2 Blackf. 356; *Ruffing v. Tilton*, 12 Ind. 259. The sections quoted have been construed as authorizing such creditors to join as plaintiffs, though their claims be separate and distinct, and even though the debtor is alive and has not absconded, if plaintiffs have a common interest in any of the relief sought, whether their claims have been reduced to judgments or not, and if they have not they may recover separate judgments on such claims, in connection with the relief sought common to all, such as suits by creditors to set aside fraudulent conveyances, and subject their debtor's property to the payment of their debts and the like. And, accordingly, persons who have any interest in the relief demanded are properly joined as plaintiffs. *Durham v. Hall*, 67 Ind. 123; *Strong v. Taylor School Tp.*, 79 Ind. 208; *Field v. Holzman*, 93 Ind. 205; *Elliott v. Pontius*, 136 Ind. 641; *Armstrong v. Dunn*, 143 Ind. 433; *Carmien v. Cornell*, 148 Ind. 83; *Pomeroy's Rem.*, sections 266, 267, 268; 1 Dan. Ch. Prac. 235. We therefore hold that the relief sought against the alleged fraud was such as was common to all the plaintiffs and was essential to the right of any of them to recover on the contract, and hence such allegations gave them a right to join as plaintiffs, and in that respect the complaint was not bad for want of sufficient facts. It is true there was no specific prayer asking that the settlement be set aside on account of the alleged fraud, but the facts were stated entitling plaintiffs to such relief and there was a general prayer for judgment and other proper relief, and that is sufficient under the code to entitle the plaintiff to all relief that the facts stated will warrant. We find that it does not allege that Friedly and Giles were partners at the time, but it does allege that Zaring and Hottel were partners,

McIntosh et al. v. Zaring et al.

engaged in the practice of law. It is contended however that enough appears in the complaint and the written contract sued on to disclose that Friedly and Giles executed the contract as partners. And in support of this contention we are cited to *Cook v. Frederick*, 77 Ind. 406; *Henshaw v. Root*, 60 Ind. 220; *Western Union Tel. Co. v. Huff*, 102 Ind. 535; *Crowell v. Western Reserve Bank*, 3 Ohio St. 406, and other authorities. We have examined them and find they do not sustain the appellants' contention as to the point in question. The manner in which the contract was signed by Friedly and Giles would be competent evidence as tending to prove the existence of a partnership between them, and that is as far as the authorities cited by appellants go. Competent evidence tending to prove a material fact, is not the fact, or the equivalent thereof. The fact must be alleged affirmatively before the demurrer admits it to be true. A demurrer admits as true only such allegations as are properly and sufficiently pleaded. *Peyton v. Kruger*, 77 Ind. 486; *Johnston v. Griest*, 85 Ind. 503; *Platter v. City of Seymour*, 86 Ind. 323; *State, ex rel., v. Foulkes*, 94 Ind. 493. It must therefore be held that the complaint does not allege or disclose the existence of a partnership between Friedly and Giles thereby showing a want of sufficient facts to constitute a cause of action as to one of the plaintiffs, namely, Edith M. Friedly, administratrix of George W. Friedly, deceased. It is contended by the appellants that there is another element in the complaint having the same effect as if the existence of said partnership between Friedly and Giles had been alleged in the complaint. And that is that while the contract sued on is separate and distinct as to, and between the three firms or groups of attorneys, as if it had been written on three separate papers, and each separately signed by

McIntosh *et al.* v. Zaring *et al.*

the several firms, that it is joint as between the members of each firm or group of attorneys. And this contention we think must prevail. The amount stipulated to be paid to Friedly and Giles was in *solido*. It was not stipulated what amount of the share to be paid to them should be paid to either Friedly or Giles. And the same is true as between the other two firms or groups of attorneys mentioned in the contract. An eminent author on contracts says: "Where the payment in the first place is of one sum *in solido* and afterwards to be divided among the payees there, generally, the interest of the payees is joint; but where the first payment is in several sums among the several payees, there, generally, their interest is several." Pars. Cont. (5th ed.) 19. The interest therefore of Friedly and Giles, even in the absence of a partnership between them is, as between themselves, joint in the share to be paid to them under this contract. On such a contract the law vests the right of action exclusively in the survivors where one or more of the joint obligees have died. 1 Pars. Cont. (5th ed.) 31. As was said by this court in *Indiana, etc., R. W. Co. v. Adamson*, 114 Ind., at p. 285: "The question with which we have to deal is important, and not entirely free from difficulty, but, after the most careful study we have been able to give the subject, we feel bound to hold that the code does not change the common law rule. The question goes back of the procedure and takes up the element of the right itself. The right, the statute does not profess to change; it reaches only the remedy. In the case of a joint contract the whole right—the unified interest—vests in the survivors. Upon them falls the entire right. If they do possess the entire right, then they are the real parties in interest, since it is inconceivable that if they do possess the entire right any other person can be a real

McIntosh et al. v. Zaring et al.

party in interest. The principle of the common law vesting the whole right in the survivors is not changed by the code, and so long as the principle remains unchanged the persons possessing this entire right must be regarded as the real parties in interest. It requires legislation to abrogate a rule of law, and the courts cannot assume the functions of the legislature.

“Mr. Pomeroy, who has as strongly as any one urged a liberal construction of the code and an extension of its provisions, affirms that the common law principle has not been abrogated. In discussing the question he said: ‘In actions *ex contractu*, all the persons having a joint interest must be made plaintiffs, and, when one of them dies, the action must be brought or must proceed in the names of the survivors; the personal representatives of the deceased obligee or promisee cannot be joined as co-plaintiffs; and in the same manner, in actions *ex delicto* for injuries to personal property, all the joint owners must unite, and if one of them dies, the action is to be prosecuted by the survivors alone. These common law rules remain in full force.’” It follows that the complaint shows upon its face that it did not state facts sufficient to constitute a cause of action in favor of one of the plaintiffs, namely, Edith M. Friedly, administratrix of George W. Friedly, deceased, the same as if the complaint had alleged the existence of a partnership between Friedly and Giles. But the existence of such a partnership was directly alleged by the second paragraph of the answer to which the court sustained a demurrer for want of sufficient facts. It averred that at the time the contract sued on was executed, and the time the services were performed thereunder by Friedly and Giles they were partners in the practice of law. It concludes with the statement: “That Edith M. Friedly, admx., etc., is therefore not a proper party

McIntosh et al. v. Zaring et al.

to this suit and is improperly joined as plaintiff herein, wherefore said defendants pray judgment." The code provides that: "Where any of the matter enumerated in section eighty-five [section 309] do not appear upon the face of the complaint, the objection (except for misjoinder of causes) may be taken by answer." Section 346, Burns' R. S. 1894 (343, R. S. 1881). The matters enumerated in said section are the grounds for demurring to a complaint, among which is that the complaint does not state facts sufficient to constitute a cause of action. The answer in question being filed for the purpose of taking an objection to the complaint which did not appear on its face, the facts stated in such answer must be considered along with those stated in the complaint in determining such objection. Otherwise this objection to the complaint can never be raised at all, because the concluding part of the section of the code quoted provides that: "If no such objection is taken either by demurrer or answer the defendant shall be deemed to have waived the same except only the objection to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action." And that objection so far as the fact of said partnership is concerned cannot be presented except by answer. It would therefore seem that in presenting it by answer, if issue is taken on that answer and the proof establishes the truth of the answer, it defeats the complaint in the same manner as if the facts of the answer appeared in the complaint and a demurrer had been sustained to it. But by the action of the court in sustaining the demurrer to such answer the facts in it are admitted of record in connection with the complaint. Hence, it would seem that the court ought to have carried the demurrer to the answer

McIntosh et al. v. Zaring et al.

back to the complaint, if such answer stated facts enough to show that the administratrix of the deceased partner had no right of action on the contract sued on as we shall presently see. *Heiser v. Kelly*, 73 Ind. 582; *Dorrell v. Hannah*, 80 Ind. 497. But the right to carry the demurrer back to and sustain it to the complaint depends entirely on whether the facts stated in the answer as an objection to the complaint, and admitted by the plaintiff's demurrer to said answer, can be considered as a part of the facts on which the complaint rests. Be that as it may, if the answer stated a valid objection to the complaint the court erred in sustaining the demurrer to it. It is thoroughly settled law that the right of action to collect the debts and assets due to a partnership where any of the partners are dead is vested by law exclusively in the surviving partner or partners. *Needham v. Wright*, 140 Ind. 190; *Valentine v. Wisor*, 123 Ind. 47; *Anderson v. Ackerman*, 88 Ind. 481; *Nicklaus v. Dahn*, 63 Ind. 87; *Willson v. Nickolson*, 61 Ind. 241; *Cobble v. Tomlinson*, 50 Ind. 550; *Parsons Partnership* (4th ed.), sections 32, 286, 342; *Roy v. Vilas*, 18 Wis. 179; 2 *Bates Partnership*, section 1147. As was said in *Anderson v. Ackerman*, *supra*: "Where a partnership is dissolved by the death of a member of the firm, the law invests the surviving partner with the exclusive right of possession and management of the entire assets and property of the partnership, for the purpose of settling and closing up the firm's business. The administrator of the deceased partner has no claim upon the specific property or assets of the firm, as such."

And as was said in *Willson v. Nickolson*, *supra*: "It has long been a well settled rule of law, that a surviving partner is entitled to the exclusive possession and control of the assets of his firm, including choses in action, for the purpose of settling and closing up the

business of the partnership, and we see nothing in the act requiring him to file an inventory and an appraisal of such assets, which changes the rule. 1 R. S. 1876, p. 641," citing *Morrison v. Kramer*, 58 Ind. 38, holding that the failure to inventory did not affect exclusive right of the surviving partner to sue for and collect the debts of the firm. To the same effect are *Hadley v. Milligan*, 100 Ind. 49; *State v. Matthews*, 129 Ind. 281; *First National Bank v. Parsons*, 128 Ind. 147; *Havens, etc., Co. v. Harris*, 140 Ind. 387. It follows from what we have said that there was no right of action on the contract in appellee Edith M. Friedly, administratrix of the deceased member of the firm of Friedly and Giles, both because it appears on the face of the complaint that the contract sued on created a joint interest in Friedly and Giles, the right to enforce which was vested by law exclusively in the surviving joint contractor Giles, and because of the facts alleged in the second paragraph of the answer that they were partners in the contract, in which case, as we have seen, the law vests the exclusive right to collect the assets of the firm in the surviving partner. The question then remains, what is the effect on the complaint when it appears from its face that no cause of action is stated in favor of one of the plaintiffs, and what effect on the right of the other parties to maintain the action where other facts are stated in an answer to which a demurrer has been sustained showing that one of the plaintiffs has no right of action.

It is firmly settled in this State that a complaint which does not state a good cause of action as to all, though it does as to some of the plaintiffs, is bad as to all, for want of sufficient facts to constitute a cause of action. *Berkshire v. Shultz*, 25 Ind. 523; *Davenport v. McCole*, 28 Ind. 495; *Debolt v. Carter*, 31 Ind. 355; *Fatman v. Leet*, 41 Ind. 133; *Maple v. Beach*, 43 Ind.

McIntosh et al. v. Zaring et al.

51; *Sim v. Hurst*, 44 Ind. 579-586; *Griffin v. Kemp*, 46 Ind. 172-177; *Neal v. State*, 49 Ind. 51; *Yater v. State*, 58 Ind. 299-301; *Parker v. Small*, 58 Ind. 349-352; *Harris v. Harris*, *supra*; *Nave v. Hadley*, 74 Ind. 155; *Schee v. Wiseman*, 79 Ind. 389; *Martin v. Davis*, *supra*; *Headrick v. Brattain*, 83 Ind. 188; *Hyatt v. Cochran*, 85 Ind. 231; *Thomas v. Irwin*, 90 Ind. 557; *Darkies v. Bellows*, 94 Ind. 64; *Dill v. Voss*, 94 Ind. 590; *Holzman v. Hibben*, 100 Ind. 338-340; *Brumfield v. Drook*, 101 Ind. 190; *Brown v. Critchell*, 110 Ind. 31; *Peters v. Guthrie*, 119 Ind. 44; *Traders Ins. Co. v. Newman*, 120 Ind. 554; *Sedwick v. Ritter*, 128 Ind. 209; *Brunson v. Henry*, 140 Ind. 455. To obviate the inevitable conclusion to which these authorities lead, appellees' learned counsel invoke the aid of another section of the code reading thus: "Judgments may be given for or against one or more of the several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." Section 577, Burns' R. S. 1894 (568, R. S. 1881). They therefore insist, in effect, that, under this provision of the code, a judgment may be rendered in favor of each of the plaintiffs as have a cause of action stated in their favor in the complaint, and judgment may be rendered against the others in favor of whom no cause of action is stated in the complaint. If that is the true force and effect of that section of the code then all that long line of decisions of this court last cited is wrong, and every one of them ought to be overruled. But the section is wholly inapplicable to a question of pleading, and that is the question we have been dealing with. The section referred to relates to a question of evidence, and the manner of the

McIntosh et al. v. Zaring et al.

rendition of judgment in such cases. The section authorizes the rendition of judgment in favor of some of the plaintiffs and against others of them, when the evidence requires or justifies it. That could not be done at common law. But the section assumes that the complaint is good, stating facts sufficient to constitute a cause of action in favor of all the plaintiffs. Accordingly it was said in speaking of this section by this court in *Nicodemus v. Simons*, 121 Ind., at p. 567: "If, therefore, two or more persons bring a joint action, alleging a joint cause of action, and it turns out upon the trial that upon the facts alleged in the complaint some, but not all, of the plaintiffs are entitled to recover, the court or jury, as the case may be, will so find, and judgment will be rendered accordingly. * * * But, as we have already held, the complaint is good, and the question before us is one of evidence, and not of pleading; upon the evidence before them, the jury found for the female appellee and the court rendered judgment in her favor. This, we think, was proper, and is in accordance with the provisions of said section 568, R. S. 1881." It is very clear that the section quoted is in no way inconsistent with the long line of cases cited holding that a complaint by plaintiffs will be bad for want of sufficient facts if it does not state a cause of action in favor of all the plaintiffs. It follows from the principle decided in that line of cases that the complaint before us failing to show that Edith M. Friedly, admx., etc., had any right of action on the contract, and showing affirmatively that the interest of her intestate and the appellee Giles in said contract was joint, and vested in the surviving joint contractor the sole right of action thereon; and therefore the complaint failing to state a cause of action in favor of Edith M. Friedly it did not state facts sufficient to constitute a cause

of action as to any of the other plaintiffs. It also follows from what we have said that the court below erred in sustaining the demurrer to the second paragraph of the answer. A very strong showing is made in argument that there were many reversible errors involved in the motion for a new trial, in the giving and refusal of instructions, rulings on motions to suppress portions of depositions, the admission and rejection of evidence, and many other things. But the record is in such a condition that we cannot pass upon any of the questions involved in the motion for a new trial. In the first place the evidence is not in the record, because there is no showing that the longhand manuscript was ever filed in the clerk's office of the court from which the appeal came, before its incorporation in the bill of exceptions. The instructions are in the record, but, unfortunately, we think the motion for a new trial was made too late to be available. The verdict was returned in the Jackson Circuit Court on the last day of the term, the case being tried by a special judge. The regular judge on that day made an order calling an adjourned term, appointing a time for it to begin; that made the adjourned or special term come between that and the next regular term. Due notice was given, and such adjourned term was held accordingly. The motion for a new trial was not filed on the day the term of court closed, but the court allowed defendants until the first day of the next term to present their motion for a new trial, but without consent of or notice to plaintiffs. The defendants did not present or file the motion at the adjourned or special term. The statute provides: "The application for a new trial may be made at any time during the term at which the verdict or decision is rendered; and if the verdict or decision be rendered on the last day of the session of any

Walker et al. v. Walker et al.

court, or on the last day of any term, then, on the first day of the next term of such court, whether general, special, or adjourned." Section 570, Burns' R. S. 1894 (561, R. S. 1881). The court had no right to extend the time for filing the motion beyond the time fixed by law for filing the same, especially in the absence and without the consent of the appellees. *Cut-singer v. Nebeker*, 58 Ind. 401; *Pennsylvania Co. v. Sed-wick*, 59 Ind. 336; *Evansville, etc., R. R. Co. v. Maddux*, 134 Ind. 571. The statute carried the motion forward to the next term whether general, special, or ad-journed. Whichever one of these kind of terms came next after the term at which the trial took place would be and was the next term within the meaning of the statute. Therefore the application should have been made at the adjourned term.

For the errors of overruling the demurrer to the complaint for insufficiency of the complaint, and error in sustaining the demurrer to the second paragraph of the answer, the judgment must be, and is, reversed.

WALKER ET AL. v. WALKER ET AL.

[No. 18,336. Filed April 21, 1898.]

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PLEADING.—*Answer.*—Where an answer is directed to an entire com-plaint consisting of several paragraphs, in order to withstand a demurrer, it must be good as to all of the paragraphs. p. 324.

DIVORCE.—*Property Rights.*—*Adjudication.*—A decree of divorce by a court having jurisdiction of the parties and the subject-matter constitutes an adjudication between the divorced parties of all property rights or questions growing out of or connected with the marriage. p. 325.

SAME.—*Marriage.*—*Capacity of Parties.*—A decree of divorce settles the fact, as between the parties, that they were duly married to each other, and affirms the capacity of each to enter into the contract of marriage. p. 325.

SAME.—*Property Rights.*—*Breach of Antenuptial Agreement.*—Real estate conveyed by a husband to his wife in pursuance of an ante-nuptial agreement that in consideration of such conveyance she

Walker et al. v. Walker et al.

was to marry him and care for him as long as he should live cannot be recovered because of a breach of such agreement, after a decree of divorce has been granted. pp. 325-328.

From the Hancock Circuit Court. *Affirmed.*

Samuel A. Wray and Richard A. Black, for appellants.

Marsh & Cook and Felt & Jackson, for appellees.

JORDAN, J.—Thomas Walker, as guardian of William C. Walker, a person of unsound mind, filed his complaint in three paragraphs, and on the 15th day of December, 1896, instituted this action against Gussie M. Walker, William C. Dudding, and William H. Moore, the appellees in this appeal, whereby he sought to set aside a certain antenuptial contract, together with certain deeds executed by his said ward prior to his being adjudged a person of unsound mind, and to quiet the title to the real estate described in the complaint. Copies of the deeds involved in the action are filed as exhibits. The material facts disclosed by the first paragraph of the complaint and the exhibits filed therewith, may be summarized as follows: Some time in 1896 (the exact date is not stated) William C. Walker, the ward, was adjudged by the court to be a person of unsound mind, and plaintiff was appointed his guardian. On and prior to May 28, 1894, said Walker was the owner in fee simple of the lands mentioned in the complaint. Prior to March 16, 1894, Walker's wife died, and, after living as a widower for some time, he became desirous of again marrying, and formed the acquaintance of Gussie M. Wachestetter, who was his junior by many years, and whose character, as is averred, at that time was bad. Soon after becoming acquainted with this woman, William C. Walker, who was then an old man, as is alleged, feeble in body and mind, invited

Walker et al. v. Walker et al.

her to come to his home and reside, which she did, and there lived as a member of his family for about a month, during which time he proposed to her that she marry him, which proposition she accepted, and accordingly on the 16th day of March, 1894, they were married at Hancock county, Indiana, and became husband and wife. During the time said Gussie M. resided in the family of William C. Walker, prior to his marriage to her, it is charged that he was under her influence and control, and by means thereof she wrongfully caused and induced him to execute an antenuptial contract, whereby he agreed and promised to convey to her eighty acres of his land, being a part of the real estate in suit, and it is alleged that in consideration thereof she agreed to marry him and live with him as a true and loving wife, and to care for him as long as he should live. After their said marriage it appears that Walker and his wife moved onto the land in controversy, and she then began to persuade and to induce him to convey the same to her, and finally procured him, on the said 28th day of May, 1894, by warranty deed, to convey to her the lands in dispute. The real estate so conveyed to her embraced the eighty acres mentioned in the antenuptial contract, and thirty-six acres in addition thereto. It is also alleged that at the time William C. Walker executed this deed to his wife he was old, and weak in both body and mind, and that she procured him to execute the same by means of promises, persuasions and threats. The deed recites that it is executed by the husband to his said wife in consideration of love and affection, and is made in pursuance to the antenuptial contract existing between the parties, and that the purpose of said conveyance was to vest at the time in the wife the real estate thereby conveyed; and the deed further provided that in consideration of the

Walker et al. v. Walker et al.

thirty-six acres conveyed in addition to the eighty acres, that the grantee, or wife, in the event of the death of the grantor, her husband, was not to be entitled to claim or receive any sum or consideration out of the estate of the grantor, as his widow or otherwise. It is further provided therein that in the event the grantee should not live with the grantor, or should abandon him without just cause, and refuse to take care of him, as stipulated in the antenuptial contract, then the conveyance was to be void and the title to the real estate was to vest in the grantor. It was also provided in the deed that the antenuptial contract was to be continued in force, except as modified by the stipulations in said deed. It is alleged that a short time after the execution of this deed to his wife, Walker became of unsound mind, and has so continued, and while in said condition, on December 3, 1894, his wife sold the real estate to the defendants, Dudding and Moore, and by warranty deed, in which he as her husband joined, conveyed the same to these parties, who have ever since held it, and now claim to be the owners thereof. It is charged that the consideration for the conveyance of the said real estate, paid by Dudding and Moore, was received by the wife, and no part of the same was ever paid to the husband. It appears, however, by the stipulations and terms of the deed of Walker and wife to these defendants that the land was conveyed to them subject to certain encumbrances therein mentioned, which they agreed to pay and satisfy. It also appears that after the execution of the deed to Dudding and Moore by Walker and wife, that she deported herself in an unchaste manner, and failed to comply with the terms of the antenuptial contract or with the terms of said deed of conveyance, and finally left and abandoned her said husband. It is also alleged that the defendants,

Walker et al. v. Walker et al.

Dudding and Moore, at the time of the conveyance of said real estate to them, knew of the provisions and stipulations contained in both the antenuptial contract and the deed of Walker to his said wife, and knew that she had violated the same, and a disaffirmance of the deed by the guardian is alleged, and the prayer is that the antenuptial contract and the deeds in controversy be set aside, and that the title to the lands be quieted in the plaintiff.

The facts averred by the second and third paragraphs are in the main similar to those alleged in the first, except in the second it is charged that the plaintiff's ward, at and before the execution of the antenuptial contract, and at the time of his said marriage to the defendant Gussie M. Walker, was a person of unsound mind, and so continued to the commencement of this action.

The third paragraph avers a breach of the antenuptial contract on the part of the wife, and also her failure to comply with the provisions and stipulations contained in the deed of conveyance to her, and it is therefore sought to set aside each of these instruments.

Appellees unsuccessfully demurred to each paragraph of this complaint, and thereafter filed a joint answer in four paragraphs, all of which except the fourth were subsequently withdrawn, and the latter is the only one appearing in the record. This paragraph of answer, after admitting the execution of the antenuptial contract and the deeds in controversy, proceeds to allege that while the said William C. and Gussie M. Walker were husband and wife, and while they were living together as such, under and in pursuance of the terms of said antenuptial contract and deed, all of which terms and conditions, it is averred,

Walker et al. v. Walker et al.

have been faithfully complied with and performed on the part of the said wife, she and her said husband, William C. Walker, for and in consideration of \$4,000.00, sold the land set out in the complaint to the defendants, Dudding and Moore, and by warranty deed, in which her husband joined, conveyed the said realty to these defendants, who took possession thereof and have ever since held it in fee simple as their own. It is averred that at the time these lands were sold and conveyed to said defendants the antenuptial contract was voluntarily surrendered by the said William C. Walker and wife to the defendants and delivered up to them for cancelation, and was subsequently destroyed; that after the said conveyance by Walker and wife, at the December term, 1895, of the Hancock Circuit Court, the said William C. Walker instituted an action in said court against his said wife, Gussie M. Walker for a divorce; that she appeared to this action by her attorney and filed her answer in general denial, and that such proceedings were had between the parties in said divorce suit in said court, that on the 5th day of March, 1895, the court rendered its decree in favor of the plaintiff, William C. Walker, granting him a divorce from his said wife; that said decree was absolute and not appealed from, and still remains in full force and effect; that after the execution of the deeds in dispute, and after said divorce was decreed in favor of said William C. Walker, he was adjudged to be a person of unsound mind, and the plaintiff was appointed as his guardian. It is alleged that by reason of said divorce decree that the rights of plaintiff's ward in respect to said deeds of conveyance, and the rights and interest of his ward in and to the real estate in controversy, have been adjudicated and forever set at rest, and that the plaintiff is not entitled by reason of the facts alleged in said answer to maintain the action, etc.

Plaintiff demurred to this paragraph of the answer for insufficiency of facts, which the court overruled, and thereupon the plaintiff refused to plead further in the action, but elected to stand by his demurrer, and judgment was accordingly rendered in favor of the defendants. After the rendition of this judgment, and before the case was appealed to this court, plaintiff's ward died, and appellants, who are his children and grandchildren by a former marriage, and his only heirs at law, prosecute this appeal against the appellees, and assign that the court erred in overruling the demurrer to the fourth paragraph of the defendants' answer.

The first paragraph of the complaint apparently proceeds upon the theory that the execution of both the antenuptial contract and the deed of conveyance by Walker to his wife were wrongfully procured by the means of her undue influence over her husband. There is no express charge made in this paragraph that plaintiff's ward, at the time he executed either of said instruments, was of unsound mind, but it seems from the averments that his mind became unsound after he conveyed the land to his wife, but before it was sold and conveyed to the defendants, Dudding and Moore. The theory of the second paragraph is that Walker, at and prior to the marriage in controversy, was of unsound mind, and continued to be in such mental condition when he executed the antenuptial contract and the deeds involved in this suit. The theory of the third paragraph seems to be that the wife, being bound by the provisions and stipulations contained in the antenuptial contract, and by those embraced in the deed whereby the real estate was conveyed to her by her husband, failed to comply with, or carry out these provisions, and thereby the title to the land had been forfeited.

Walker et al. v. Walker et al.

Counsel for appellants assert that the only question for our consideration in this appeal is: Does a judgment divorcing a husband and wife settle all questions of property rights between such divorced parties?

The answer here involved was directed to the entire complaint, and upon the assumption that each paragraph thereof was sufficient in stating a cause of action, it must, in order to withstand the demurrer, be good as an answer, to all.

Appellants insist that so far as this pleading attempts to answer the second paragraph of the complaint it is certainly bad, for the reason that it is alleged therein that William C. Walker at the time of his marriage to the appellee, Gussie M., was a person of unsound mind, and so continued until the commencement of this action; consequently, by reason of section 7290, Burns' R. S. 1894 (5325, R. S. 1881), which declares a marriage to be void when either party thereto at the time thereof is insane, they contend that said marriage was an absolute nullity, and all contracts between the parties thereto, growing out of or connected with it, likewise void.

The subject-matter involved in this action under each paragraph of the complaint is the real estate, the title to which the plaintiff seeks to have quieted as against all of the defendants. The appellees, Dudding and Moore, claim title to the land through the deed of conveyance executed to them by their co-appellee and her husband, William C. Walker. The title to this land, which Gussie M. Walker claimed to have, before she and her husband conveyed it to her co-appellees, was founded on the deed which her husband made to her in consideration of love and affection, and in pursuance of the antenuptial agreement. It is evident that before the plaintiff can prevail in

quieting title to the land in this action he would be compelled to avoid the deed of the ward to his said wife. By a long line of decisions beginning with the case of *Fischli v. Fischli*, 1 Blackf. 360, the doctrine has been generally affirmed and settled in this jurisdiction that a decree of divorce by a court having jurisdiction of the subject-matter and the parties, is deemed and held to be an adjudication between the divorced parties of all property rights or questions growing out of or connected with the marriage. As a general rule, all such questions, unless excepted therefrom, are considered as put at rest by the judgment, and the parties thereto are precluded thereby until it is set aside in a proper proceeding. *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Rose v. Rose*, 93 Ind. 179; *Behrley v. Behrley*, 93 Ind. 255; *Hills v. Hills*, 94 Ind. 436; *Stultz v. Stultz*, 107 Ind. 400; *Nicholson v. Nicholson*, 113 Ind. 131; *Thompson v. Thompson*, 132 Ind. 288; *State, ex rel., v. Parrish*, 1 Ind. App. 441.

Such a decree, also, as between the divorced parties, conclusively settles the fact that they were duly married to each other, which of course implies the capacity of each to enter into the contract of marriage; or, in other words, the decree necessarily affirms the marriage, but frees the parties from the bonds thereof, and no proceeding can be maintained as long as it stands to have the marriage, as originally contracted, declared void. The decree also precludes the parties as to all matters which might have been legitimately proved in support of the charges or defenses in the action. 2 Bishop on Marriage and Divorce, section 766; 5 Am. and Eng. Ency. of Law, p. 847; *Prescott v. Fisher*, 22 Ill. 390; *Patton v. Loughridge*, 49 Iowa 218.

In the light of the well settled principles to which

Walker et al. v. Walker et al.

we have referred, we may proceed to determine the sufficiency of the answer. It is apparent from the facts that the right which Mrs. Walker claimed to the property here involved grew out of or was connected with the marriage, the relations of which were terminated by the judgment in the suit instituted by the husband for a divorce. The settlement of the lands by him upon her was made, as we have seen, in pursuance of the antenuptial contract, and for the purpose of vesting the title to the property in her at the time of the conveyance. She was to take it, as the deed stipulated, in lieu of any claim or right by her in or to her husband's estate as his widow or otherwise. The answer discloses that the husband instituted the action for a divorce in a court having jurisdiction; that the wife appeared to the suit and filed her answer; that such proceedings were had therein as resulted in the court awarding a judgment in favor of the husband, divorcing him and his said wife. All this occurred after the conveyances mentioned in the complaint had been made, and before the husband was adjudged to be a person of unsound mind and placed under guardianship. These facts the demurrer conceded to be true, and they fully, in our judgment, when tested by the rule affirmed by the authorities, preclude the plaintiff from successfully maintaining this action. It is evident that in the face of this decree neither the divorced husband, nor anyone representing him, would be permitted to question or assail the validity of the marriage between him and his divorced wife. Under the circumstances, the decree must stand and be accepted as precluding or estopping either Walker or his guardian from asserting, as against his wife, in a collateral proceeding like this, that he was insane, either at the time of the marriage, or at the time he sued for and obtained the

divorce. Plaintiff's ward must, consequently, be considered to have been sane when he instituted his action and secured the divorce, and therefore, fully competent to have demanded and procured to be properly adjusted and adjudicated in that suit all matters of property rights arising out of the marriage, and in controversy between him and his said wife. He is presumed to have known that when the marriage relations between them were dissolved by the divorce, that she could no longer live with him as his wife, nor care for him as such, as the complaint charges she agreed to do, in consideration of his settling upon her the property in dispute. Before the action for a divorce was commenced, Mrs. Walker seems to have asserted an absolute claim of title to the land, and had sold the same to her co-appellees for \$4,000.00, which amount, it is alleged, was received by her; and, for aught that appears, she was still, at the time the divorce was granted, in possession of this amount of money, received in consideration of the sale of said real estate, and asserting a claim of title thereto. The fact that she had acquired a part of her husband's estate in advance of the divorce action was a matter which the court in that suit had a right to consider as against any claim for alimony made therein by her, either for the purpose of defeating such claim entirely, or to reduce the amount thereof. Section 1057, Burns' R. S. 1894 (1045, R. S. 1881). *Morse v. Morse*, 25 Ind. 156; *Stultz v. Stultz*, *supra*.

The fact that the divorce was granted on the grounds of the misconduct of the wife, and that the property by which she acquired the money held by her at the time of the divorce suit, may have been settled upon her by the husband by reason of her wrongful acts, in taking advantage of his alleged mental infirmities, can make no material difference in respect to the

Walker et al. v. Walker et al.

rule that the divorce decree must, as long as it stands, be held to have adjudicated all property rights arising out of or connected with the marriage, and that it confirmed in the wife the right to the property, or the money, claimed by her at the time of the granting of the divorce. *Behrley v. Behrley*, *supra*, and cases there cited; *Glaze v. Citizens National Bank*, 116 Ind. 492.

Where the wife proves recreant to her marriage obligations, and has destroyed the marital union by acts of adultery or other gross misconduct, and her husband is thereby entitled to a decree of divorce, the court granting the same, has the discretionary power, and, under proper circumstances warranting the same, will generally exercise it, and allot to the injured husband such a portion of the property or means which he had settled upon the wife as will place him in the position, to some extent at least, which he would have occupied had the union continued. 2 Bishop on Marriage and Divorce, section 509a; *Stultz v. Stultz*, *supra*.

All such matters, under the firmly established rule, must be deemed to be by the judgment *res adjudicata*, and neither the divorced husband, nor those claiming to represent him, will be permitted to bring such property questions again into issue as against the divorced wife or those claiming through her.

The rule which precludes the parties in this respect is a salutary one, as it certainly would not be proper after the divorce, to leave open and unsettled questions in regard to property which the wife might have received from the husband during the marriage.

It must follow, therefore, from what we have said, that the paragraph in controversy was substantially sufficient as an answer to the complaint as an entirety, and the court did not err in overruling the demurrer. The judgment is affirmed.

The Chicago and Southeastern Railway Company v. Higgins.

THE CHICAGO AND SOUTHEASTERN RAILWAY COMPANY
v. HIGGINS.

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[No. 18,432. Filed April 21, 1898.]

JUSTICES OF THE PEACE.—Pleading Judgment Of.—Jurisdiction.—

Under the provision of section 372, Burns' R. S. 1894 (369, R. S. 1881), that in pleading a judgment of a court of special jurisdiction it shall be sufficient to allege generally that judgment was duly given or made, it is not necessary to allege the facts conferring jurisdiction, provided it is alleged that judgment was duly given or made. *pp. 329, 330.*

JUDGMENT.—Assignment.—To pass the legal title to a judgment by assignment, the clerk of the court, or justice of the peace, must attest such assignment. *pp. 330, 331.*

SAME.—Equitable Assignment.—In an action by an equitable assignee of a judgment, the assignor should be made a party defendant to answer as to his interest. *p. 332.*

From the Boone Circuit Court. *Reversed.*

W. R. Crawford and U. C. Stover, for appellant.

C. M. Zion, for appellee.

MONKS, J.—This action was brought by appellee against appellant to enforce the payment of a judgment alleged to have been rendered by a justice of the peace against the Midland Railway, to whose rights and liabilities appellant has succeeded. Judgment was rendered against appellant. The court overruled a demurrer to the complaint for want of facts and for "defect of parties defendant in this: that George L. Weitzel should have been made a defendant in said action," and this ruling is assigned as error.

It is first insisted by appellant that the complaint was insufficient because there are no averments showing that the justice of the peace by whom the judgment was rendered had in any way acquired jurisdiction over the judgment defendant, the Midland Railway Company. It is provided by section 372, Burns' R. S. 1894 (369, R. S. 1881), that "In pleading a judg-

The Chicago and Southeastern Railway Company v. Higgins.

ment or decision of a court or officer of special jurisdiction, it shall be sufficient to allege, generally, that the judgment or decision was duly given or made. If the allegation be denied, the facts conferring jurisdiction must be proved at the trial." Since the taking effect of this section in 1853 it has not been necessary in pleading a judgment of a justice of the peace of this or another jurisdiction to allege the facts conferring the jurisdiction, provided it is alleged, "that said judgment was duly given or made." *Hopper v. Lucas*, 86 Ind. 43, and cases cited; *Crake v. Crake*, 18 Ind. 156; *Shockney v. Smiley*, 13 Ind. App. 181. It was not alleged in the complaint that the judgment was duly given, or that it was duly made. Neither was there any averment showing that the justice of the peace had any jurisdiction over the Midland Railway Company. It is true, that where it appears that inferior courts have jurisdiction over the subject-matter, and have acquired jurisdiction over the persons of the parties to the action, the same presumptions are indulged in favor of the regularity and validity of the proceedings as are indulged in favor of the proceedings of courts of superior jurisdiction. *Johns v. State*, 104 Ind. 557, 560, and cases cited. But no presumptions will be indulged that courts of justice of the peace have acquired jurisdiction of the parties. This must be shown by the facts alleged in the pleading, or the statutory averment that the judgment was duly made or given. *Hopper v. Lucas*, *supra*, p. 46, and cases cited.

It is clear that the complaint was not sufficient to withstand the demurrer for want of facts.

It is alleged in the complaint that the judgment was rendered by the justice of the peace in favor of George L. Weitzel, and that a transcript thereof was filed in the office of the clerk of the circuit court of

The Chicago and Southeastern Railway Company v. Higgins.

Boone county, Indiana, and recorded in the order book of said court, and that afterwards said "George L. Weitzel, for value received, sold, assigned, and transferred by indorsement in writing on the record of said judgment, where recorded in the office of the clerk of said court, all his right, title, and interest in and to said judgment to Moses P. Higgins, the plaintiff herein, who is the owner and holder of said judgment and entitled to the payment thereof."

Counsel for appellant insist that said allegations only show an equitable assignment of the judgment to appellee, and not an assignment under the statute, and that therefore George L. Weitzel should have been made a party defendant in the court below to answer to his interest in said judgment, as required by section 277, Burns' R. S. 1894 (276, R. S. 1881). The statute concerning the assignment of judgments of a court of record, and of a justice of the peace, is that they "may be assigned by the plaintiff or complainant, and the assignees thereof successively, on or attached to the entry of such judgment or decree; and the assignment, when attested by the clerk of the court or such justice of the peace, shall vest the title to such judgment or decree in each assignee thereof successively." Section 612, Burns' R. S. 1894 (603, R. S. 1881). Before the enactment of said section, judgments were not assignable so as to vest the legal title in the assignee. *Lapping v. Duffy*, 47 Ind. 51, 52; *Reid v. Ross*, 15 Ind. 265. Under our code an equitable assignee of a judgment may maintain an action thereon. *Lapping v. Duffy*, *supra*, pp. 52, 53, and cases cited. To pass the legal title to a judgment the requirements of said section must be complied with. *Kelley v. Love*, 35 Ind. 106, 107; *Burson v. Blair*, 12 Ind. 371, 373. Under the statute the legal title vests in the assignee when the required assignment is attested

Ervin *et al.* v. The State, *ex rel.* Walley.

by the proper officer. As there is no allegation showing that the assignment was attested by the proper officer, the same only vested an equitable title in the appellee. The rule is that in an action by an equitable assignee the assignor should be made a party to answer as to his interest. *Kelley v. Love, supra*, pp. 107-108; *Clough v. Thomas*, 53 Ind. 24; *Nelson v. Johnson*, 18 Ind. 329. It would seem therefore that George L. Weitzel should have been made a party defendant to answer as to his interest. *Kelley v. Love, supra*, 107-108. Judgment reversed, with instructions to sustain the demurrer to the complaint.

ERVIN ET AL. v. THE STATE, EX REL. WALLEY.

[No. 17,608. Filed Nov. 19, 1897. Rehearing denied April 21, 1898.]

GAMING.—Lost Money.—Recovery.—Section 6678, Burns' R. S. 1894 (4953, R. S. 1881), providing that money or anything of value lost by betting on any game may be recovered in an action by the State for the benefit of the wife or minor children of the person losing same upon the failure of the person losing the same to institute an action for the recovery thereof as in the preceding section provided, is not in conflict with section 21, article 1, of the State constitution, that "no man's property shall be taken without just compensation," as such property is lost to him by his failure to sue to recover it within six months, as in the statute provided for the recovery thereof. pp. 334-336.

SAME.—Lost Money.—Recovery.—Parties.—An action for the recovery of money, lost at gaming, for the benefit of the wife of the loser, under the provision of section 6678, Burns' R. S. 1894 (4953, R. S. 1881), may be maintained in the name of the State for the benefit of the wife, notwithstanding the provision of section 251, Burns' R. S. 1894 (251, R. S. 1881), that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section," the next section providing that "an executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted," as the State is within the meaning of the word "person" as used in such last section. pp. 336, 337.

SAME.—Recovery by State.—When Action Commenced.—The action

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Ervin et al. v. The State, ex rel. Walley.

provided by section 6678, Burns' R. S. 1894 (4953, R. S. 1881), for the recovery by the State of money lost at gaming for the benefit of the wife of the loser does not accrue until six months thereafter, or until the loser's right of action expires, as provided by the preceding section. pp. 337-340.

JUDICIAL NOTICE.—Pleading.—Not Necessary to Plead Statute.— Courts take judicial cognizance of the statutes of the State, and it is not necessary in an action founded upon a statute to state in the complaint that the action is founded upon a certain statute by referring to it by title and date of passage, when the facts stated are sufficient to enable the court to know that the action was founded upon the statute. p. 340.

GAMING.—Recovery of Lost Money.—Complaint.—Sufficiency.— A complaint in an action by the State to recover for the loser's wife money lost at gaming, which avers "that the defendants are * * * indebted to plaintiff for the use and benefit of Nellie A. Walley, the sum of \$6,000.00, * * * lost by William A. Walley to the defendants at gaming by betting and wagering upon the game at cards known as faro, * * * and had and received by the defendants for the use and benefit of one William A. Walley, * * * the husband," etc., sufficiently alleges that the money lost was paid to the defendants within the meaning of the provision of section 6677, Burns' R. S. 1894 (4952, R. S. 1881), that in such action it shall be sufficient for the plaintiff to allege that the defendant has received, for the plaintiff's use the money so lost and paid. pp. 340, 341.

SAME.—Recovery of Lost Money.—Parties.—An action to recover for the loser's wife money lost at gaming, must be brought in the name of the State, and the wife is not a proper party plaintiff, and does not become a party plaintiff by being named as relator. pp. 341, 342.

SAME.—Recovery of Lost Money.—When Money Belonged to Wife of Loser.—An action cannot be maintained under sections 6676-6678, Burns' R. S. 1894 (4951-4953, R. S. 1881), for the recovery of the wife's money gambled away by her husband without her knowledge or consent, as she would have an action at common law against the winner as a trustee *de son tort* for the recovery thereof. pp. 342-345.

PRACTICE.—Harmless Error.—Overruling Demurrer to Bad Pleading.—It is harmless error to overrule a demurrer to a paragraph of complaint which fails to state a cause of action, where it affirmatively appears that the verdict and judgment rested upon other paragraphs of the complaint. pp. 346, 347.

SAME.—Overruling Demurrer to Bad Pleading.—Reversal of Judgment.—The provision of section 348, Burns' R. S. 1894 (345, R. S. 1881), that "no objection taken by demurrer and overruled shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined," has

Ervin et al. v. The State, ex rel. Walley.

no application to a cause where the record fails to show that the ruling on the demurrer was harmless. pp. 346, 347.

From the Delaware Circuit Court. *Reversed.*

J. W. Ryan, W. A. Thompson and Warner & Brady,
for appellants.

*M. E. Forkner, J. G. Leffler and James N. Templer
& Son,* for appellee.

MCCABE, C. J.—The appellee sued the appellants to recover money alleged to have been lost by William A. Walley, the relator's husband, to the appellees by betting on a game called faro, under sections 6676, 6678, Burns' R. S. 1894 (4951, 4953, R. S. 1881.) The complaint was in five paragraphs, and the court overruled a several demurrer by the defendants to each paragraph for want of sufficient facts, and that the plaintiff had no capacity to sue.

A trial of the issues resulted in a verdict and judgment for \$5,414.50 over appellants' several and joint motions for a new trial. The court also overruled appellants' motion to modify the judgment.

The errors assigned call in question these several rulings, and also call in question the sufficiency of the complaint.

The first question presented in support of the alleged insufficiency of each paragraph of the complaint is, that the statute on which the action is founded is unconstitutional. If this charge against the statute is true the people of the State are a little late in discovering it, because the statute has been substantially in force for over half a century, and has been several times under consideration by this court in actions founded on it appealed here. The second section of the act, as its sections are numbered in the revision of 1852, being section 6676, Burns' R. S. 1894 (4951, R. S. 1881), reads thus: "If any person by bet-

Ervin. et al. v. The State, ex rel. Walley.

ting on any game, or betting on the hands or sides of such as play at any game, shall lose to any one any money, or valuable thing, and shall pay or deliver the same, or any part thereof, the person so losing and paying, or delivering the same, may, within six months next following, recover the money or other valuable thing so lost and paid or delivered, or any part thereof, with costs of suit, by action founded on this act, to be prosecuted in any court having jurisdiction thereof."

The fourth section, old number, being section 6678, Burns' R. S. 1894 (4953, R. S. 1881), reads thus: "In case the party so losing such money or other thing aforesaid shall not, within the time aforesaid, *bona fide* sue and with effect prosecute for the money or thing so lost and paid or delivered, it shall be the duty of the prosecuting attorney, on information filed with him by such action as aforesaid, to sue for and recover the same in the name of the State, with costs of suit, against any such winner, for the benefit of the wife or minor children, or either of them, if living, in the order herein named, of the person losing the same; and in case there shall be no such wife or minor children, then for the benefit of the common schools."

. It is contended that this statute authorizes the property of one man to be taken by the courts and conferred on another. It is contended that in case the loser fails to prosecute and recover the lost money, it then becomes the property of the winner, and that it cannot be taken from him and given to the wife or children of the loser or to the common schools, without just compensation. That the statute, in so far as it authorizes a recovery for the benefit of the wife, children, or common schools, violates section 21 of article 1 of the State constitution, providing that "no man's property shall be taken without just compensation." Section 66, Burns' R. S. 1894 (66, R. S. 1881).

Ervin et al. v. The State, ex rel. Walley.

But appellants' counsel are in error in supposing that title to money or property lost at gaming ever vests in the winner. It is true, without the aid of this statute, the loser cannot recover back money or other property which has been paid or delivered on gambling contracts or a bet, because it was so lost in a transaction which is in violation of the criminal law of the State, and, the parties being *in pari delicto*, the law will not aid either of them. 8 Am. and Eng. Ency. of Law, 1021, and notes. Most, if not all, the states have statutes of a similar character, and none of them have ever been held unconstitutional. 8 Am. and Eng. Ency. of Law, *supra*.

It is also contended that the loser has a title to the lost money or property, and to take it from him and confer it on his wife or children, would be taking his property without just compensation, in violation of the constitutional provision mentioned. But it is not true that it takes his property without compensation. He has lost his property, and it has passed beyond his reach by his failure to sue to recover it within six months. Nor do we think there is any just or reasonable ground for holding the statute unconstitutional.

It is next contended that the demurrers ought to have been sustained because the action is not prosecuted in the name of the real party in interest, namely, Nellie A. Walley, but is prosecuted in the name of the State. It is conceded that the statute on which the action is founded authorizes the prosecution of the action in the name of the State for the benefit of the wife of the loser, under certain circumstances, but it is contended that such statute was passed prior to the code, and that the code makes a different provision in relation thereto, and must be deemed the last expression of the legislative will, and controlling in this

Ervin et al. v. The State, ex rel. Walley.

respect. Conceding, without deciding, that such was the order of passage of the two statutes, and that the last act would have the effect to modify the first in so far as inconsistent therewith, we do not think that there was any such inconsistency. Section 251, Burns' R. S. 1894 (251, R. S. 1881), provides that: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." The next section provides that: "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted." The State is authorized by the statute in question to sue for the benefit of another, and the State is within the meaning of the last section of the code, if the word "person" as used therein, may be held to include the State.

Among the rules for the construction of the code, it is provided in section 1309, Burns' R. S. 1894 (1285, R. S. 1881), that: "The word 'person' extends to bodies politic and corporate." Webster defines the words "body politic" to be "The collective body of a nation or state as politically organized, or as exercising political functions; also a corporation."

Therefore, we hold that the code does not require the action to be brought in the name of the real party in interest, where, as here, a person, the State, is expressly authorized by statute to sue without joining the person for whose benefit the action is prosecuted.

The next ground taken against the sufficiency of the several paragraphs of the complaint is, that each paragraph shows that more than six months had elapsed since the money sued for had been lost at the commencement of the action. It is contended on behalf of appellants that the action, the right of which is

Ervin et al. v. The State, ex rel. Walley.

created by the statute, must be commenced within six months next following the losing and paying or delivering the money or other valuable thing, and that after such six months expires the right of action is gone, not only as to the loser, but as to the State as well.

It is undoubtedly true that the right of action in the loser is gone at the expiration of six months next after the payment or delivery of the thing lost, by the express terms of the statute. But it is not so as to the State. The State's right of action on the statute never accrues until the loser's right thereto expires. And his right does not expire until six months after the payment or delivery of the thing lost in the bet, or on the game. The State cannot begin the action as long as the loser has the right to sue, and that right continues in the loser until the last moment of the six months has expired. Then, and not till then, does the right to sue accrue to the State. "In case the loser shall not within the time aforesaid (which is six months) *bona fide* sue, etc., it shall be the duty of the prosecuting attorney on information filed by such action as aforesaid to sue," etc. Appellants contend that the words "such action as aforesaid" refer to the action authorized by the first section above quoted to be prosecuted by the loser, and that the second section quoted means to clothe the State with the same right of action created by the previous section in the loser, and that right by the express terms of the section subsisted only six months next following the payment or delivery of the money or other valuable thing so lost by a bet on a game. Undoubtedly the words 'by such action as aforesaid' refer to the action the right to which is created in the previous section in favor of the loser. It is sufficiently clear to leave no doubt that the same right of action thus created in

Ervin et al. v. The State, ex rel. Walley.

the loser should at some time pass from him and vest in the State for the benefit of the wife and children, or, if there be no wife or children, the common schools, in the order named. But it could not have been intended to confer on and vest in the State the identical right of action first vested in the loser, both in form and substance. Because that would have required the action to have been brought by and in the name of the State as well as that in the name of the loser, within six months next following the payment or delivery of the money or thing lost. That would bring the statute into contradiction of itself. Because it provides that on failure of the loser to sue for six months the action may be brought in the name of the State for the benefit of others. Appellants' contention would result in making it mean that the action must not be brought in the name of the State at all for the benefit of others, but must be brought only in the name of the loser, and not for the benefit of others. That construction would result in making the statute mean that the right of action was created in the loser and in the State separately, to continue in each separately for six months. And, if that is true, each could recover during that period the whole of the lost money. Such a construction would make nonsense of the statute.

The true construction of the statute is that at the expiration of the six months the right of action, created in the loser, if he shall not sue within that time, passes to and vests in the State for the benefit of the wife, etc. It does not mean that the identical form of action shall be vested in the State, but the substance thereof passes to and vests in the State to the right to recover the money or thing lost. It does not mean that it shall be brought in six months, nor that it shall be brought by or in the name of the loser, nor

Ervin et al. v. The State, ex rel. Walley.

for his benefit, all of which would be true if the words "it shall be the duty of the prosecuting attorney * * * by such action aforesaid to sue," etc., mean the identical action first vested in the loser.

It is also contended that the failure of each paragraph of the complaint to state that the action was founded on the statute, referring to it by title and date of passage, rendering them bad on demurrer. The statute being a public statute the courts are bound to take judicial cognizance thereof without pleading it. And the facts stated in each paragraph of complaint were sufficient to enable the court to know that the action was founded on the statute.

It is further contended that none of the paragraphs are good, because no one of them alleges that the money lost was paid to any of the defendants. The third paragraph on this point states "that the defendants are * * * indebted to the plaintiff for the use and benefit of Nellie A. Walley * * * in the sum of \$6,000.00 * * * lost by William A. Walley to the defendants at gaming by betting and wagering upon the game at cards known as faro * * * and had and received by the defendants for the use and benefit of one William A. Walley, * * * the husband," etc. We are inclined to think this language is sufficient to convey the meaning that the money had been paid in compliance with the provisions of the section first quoted, requiring, as one of the conditions upon which the right of action is conferred, that the loser "shall pay or deliver the same" the money, etc. But, if it be not sufficient, the section next following the one creating the right of action in the loser, being the third, old number, section 6677, Burns' R. S. 1894 (4952, R. S. 1881), reads as follows: "In such action, it shall be sufficient for the plaintiff to allege that the defendant has received, for the

Ervin et al. v. The State, ex rel. Walley.

plaintiff's use, the money so lost and paid, or that he has converted the goods won of the plaintiff to his the defendant's use, without setting forth the special matter."

While this section primarily applies to the complaint to be filed by the loser, yet it seems clear that the legislature must have intended it to apply in so far as it could be made applicable to the action when brought by the State. There seems no reason why the allegation as to the payment of the money by the loser to the winner should not be the same in both actions provided for.

The other paragraphs, as to this point, are as good as the third, from which we have quoted, and as to that objection we think they are all sufficient, at least, by the aid of the section of the statute last quoted.

It is further contended that the State alone is the only proper party plaintiff, where, as here, the action is brought for the benefit of the wife of the loser. The statute quoted requires the action in such cases as this to be brought in the name of the State. That means that the State must be the plaintiff. It requires no relator. *Shane v. Francis*, 30 Ind. 92. But the action here is brought in the name of the State as plaintiff. The relator is not a party plaintiff, but is simply a relator. If she becomes a party plaintiff by being named as a relator, it would make the complaint bad in every paragraph for want of sufficient facts. This is so, because the right of action is not vested in her by the statute; and it has been long settled in this court that a complaint by several plaintiffs that fails to state a cause of action in favor of any one or more of them is bad on demurrer for want of sufficient facts as to all of them so joined. *Nave v. Hadley*, 74 Ind. 155; *Schee v. Wiseman*, 79 Ind. 389;

Ervin *et al.* v. The State, *ex rel.* Walley.

Ætna Ins. Co. v. Kittles, 81 Ind. 96; *Headrick v. Brattain*, 83 Ind. 188; *Thomas v. Irwin*, 90 Ind. 557; *Field v. Holzman*, 93 Ind. 205; *Jones v. Cardwell*, 98 Ind. 331; *Holzman v. Hibben*, 100 Ind. 338; *Brumfield v. Drook*, 101 Ind. 190; *Ohio, etc., R. W. Co. v. Cosby*, 107 Ind. 32; *Brown v. Critchell*, 110 Ind. 31; *Peters v. Guthrie*, 119 Ind. 44; *Kelley v. Adams*, 120 Ind. 340; *Pfister v. Gerwig*, 122 Ind. 567; *Renihan v. Wright*, 125 Ind. 536; *Lake Erie, etc., R. R. Co. v. Priest*, 131 Ind. 413. But the naming of the relator not having the effect of making her a party plaintiff, the State is the sole party plaintiff, and the action was prosecuted in its name as plaintiff. Hence that part of the complaint naming Nellie A. Walley as relator is mere surplusage and does not vitiate the complaint.

It is also contended that the fourth paragraph of the complaint is bad on demurrer for want of sufficient facts, because it alleges "that the \$6,000.00 of money so lost by the said William A. Walley was then and there the personal property of and belonged to the said Nellie Walley, * * * the same being at the several times it was wagered, lost and paid, as aforesaid, in the possession of the said William A. Walley, her husband, as her trustee."

The action authorized by the statute under consideration is one that could not be maintained at common law. Because of the parties to the bet being *in pari delicto* the common law would leave them where they had placed themselves. *Woodcock v. McQueen*, 11 Ind. 14; *M'Hatton v. Bates*, 4 Blackf. 63. Nor would the action lie at common law to recover the money in the name of the State, or anybody else, for the benefit of the wife or children of the loser, nor for the benefit of the common schools. In other words, the legislature in passing the statute intended to create a new

Ervin *et al.* v. The State, *ex rel.* Walley.

right of action that had no existence at common law, and such a right of action as could rest alone upon the statute. The statute, nor any part thereof, cannot be applied to aid or help a cause of action the right to maintain and prosecute which existed at common law independent of and without the statute.

If the money, as alleged in the fourth paragraph, was the personal property of Nellie A. Walley, and her husband had possession of it as her trustee, he had no right to gamble it away. "It is now a universal rule that all those who take under the trustee, except purchasers for a valuable consideration without notice, take subject to the trust." 1 Perry on Trusts, section 346. The winner of her money became her trustee therefor, and liable to account and pay over the same to her. 2 Perry on Trusts, section 828. Having received the money in violation of law and without any consideration, he became a trustee *de son tort*, and liable to a suit by the *cestui que trust* to recover the money. 1 Perry on Trusts, section 245. To the same effect are *McFadden v. Wilson*, 96 Ind. 253; *Cassidore v. Beers*, 1 Abbott's App. Dec. (N. Y.), 333; *Mason v. Waite*, 17 Mass. 560; *Doyle v. McIntyre*, 71 Ga. 673; *Corner v. Pendleton*, 8 Md. 337; *Burnham v. Fisher*, 25 Vt. 514; *Pierson v. Fuhrman*, 1 Colo. App. 187, 27 Pac. 1015; *Conway v. Conway*, 24 N. Y. Supp. 261; *McAllister v. Oberne*, 42 Ill. App. 287.

It therefore clearly appears that the statute in question does not provide for the recovery of the wife's money gambled away by her husband, either in the name of the State as plaintiff, or in any other name, because she already had the right to recover it in her own name. Though she was a married woman, whose husband was still living, the statute empowered her to sue alone. It provides that: "A married woman may sue alone—First. When the action con-

Ervin et al. v. The State, ex rel. Walley.

cerns her separate property." Section 255, Burns' R. S. 1894 (254, R. S. 1881). The allegations of the paragraph show that the money was her separate property, and this court has held correctly that she may sue concerning it alone, without joining her husband. *Mills v. Winter*, 94 Ind. 329.

Another section of the code already referred to, goes further than to confer upon her permissive authority to sue in her own name, but imperatively requires, as we have seen, that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." And the next section, as already observed, provides that "a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted." Sections 251, 252, Burns' R. S. 1894 (251, 252, R. S. 1881). But we have already seen that the statute on which this action is founded does not authorize the State or any other person to sue for the benefit of the owner of money gambled away by the trustee of the owner.

But, going beyond the briefs on either side, it may be said that there is no allegation in the fourth paragraph that Nellie A. Walley's money was gambled away by her husband and trustee without her knowledge and consent, and hence it may be urged that as there is nothing in the paragraph negating such knowledge, consent, or direction, the transaction may be regarded as one in which she was *particeps criminis*, and therefore the loser within the meaning of the statute, and authorized to recover by action founded on the statute.

This, however, would make the paragraph still worse. If she participated in the illegal transaction, and thereby became the loser, and as such authorized to recover her money by action founded on the stat-

Ervin *et al.* v. The State, *ex rel.* Walley.

ute, she must sue in her own name, just as her husband or anybody else must, when suing as loser. But that is not all. She must sue within six months. But the paragraph expressly states that more than six months had elapsed when the action was brought. So that it will not aid the paragraph to indulge the presumption that Mrs. Walley's money was gambled away with her knowledge, consent, and direction, in the absence of averments to the contrary. The presumption is to the contrary, and in favor of honesty and fair dealing, innocence, and against fraud. 1 Rice Ev., pp. 88, 89 and 96; *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794. Hence we are authorized to presume that her money, alleged to have been gambled away by her husband, was so gambled away without her knowledge, consent, or connivance, and hence a common law right to recover it back on her behalf arose; and the code authorized her to invoke that right of action in her own name, and prevents the action from being brought in any other name.

Therefore, the case made by the fourth paragraph of the complaint falls squarely within the first section above referred to requiring that every action must be prosecuted in the name of the real party in interest. That party was Nellie A. Walley and not the State of Indiana.

Where the facts stated in the complaint show that the plaintiff is not the real party in interest, and there is no statute expressly authorizing the plaintiff to sue without joining with him the person for whose benefit the action is prosecuted, as is the case here, such complaint is bad on demurrer for want of sufficient facts to constitute a cause of action. *Rawlings v. Fuller*, 31 Ind. 255; *Smock v. Brush*, 62 Ind. 156; *Shoemaker v. Board, etc.*, 36 Ind. 175; *Board, etc., v. Jameson*, 86 Ind. 154; *Pixley v. Van Nostern*, 100 Ind. 34.

Ervin et al. v. The State, ex rel. Walley.

It follows that the fourth paragraph of the complaint does not state facts sufficient to constitute a cause of action, because the State, the sole plaintiff, had no right to maintain the action under the facts stated therein.

It is, however, contended by the learned counsel for the appellee that the error, if error there was, in overruling the demurrer to the fourth paragraph was harmless, and no cause for reversal. It is true, if it affirmatively appeared that the verdict and judgment rested on the other, or any of the other paragraphs, then the error of overruling the demurrer to the fourth paragraph would be a harmless error. But the learned counsel for appellee broadly concede that "it affirmatively appears that the judgment rendered was rendered on all the paragraphs of the complaint," referring to the answer to interrogatory 48. Another thing appears in the record that would seem to indicate that the judgment rests on the fourth paragraph, and that is, instead of being rendered in favor of the plaintiff, the State of Indiana, for the benefit of Nellie A. Walley, it is rendered in favor of Nellie A. Walley alone. But it is enough to make the error harmful, and cause for reversal that the record fails to show affirmatively that the verdict and judgment rest exclusively on other paragraphs than the fourth. *Rowe v. Peabody*, 102 Ind. 198; *Elliott's App. Proc.*, section 666, and cases there cited.

The learned counsel, however, refer to the code providing that: "No objection taken by demurrer, and overruled shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined." Section 348, Burns' R. S. 1894 (345, R. S. 1881). And they refer also to a decision of the Appellate Court applying that section of the code, but they misname the case

Ervin *et al.* v. The State, *ex rel.* Walley.

and do not refer to the volume. The case, however, is *Lake Shore, etc., R. W. Co. v. Kurtz*, 10 Ind. App. 60. But they could have found several cases in this court where that provision of the code had been applied. *Baker v. Pyatt*, 108 Ind. 61; *Miller v. Bottenburg*, 144 Ind. 312. But those cases show that said section of the code has no application where the record fails to show that the ruling on the demurrer was harmless. As was said in *Chapman v. Jones*, 149 Ind. 434, "that a cause can have no merits where there is no complaint, or where the complaint, as here, does not state facts sufficient to constitute a cause of action."

There is another objection urged against the sufficiency of each and every one of the paragraphs of the complaint. It is that each paragraph fails to allege that an information was filed with the prosecuting attorney. In as much as the judgment must be reversed on the fourth paragraph, and from what appellee's counsel have said in their briefs they may, by a slight amendment in each paragraph, take the question thus raised entirely out of the record, we deem it unnecessary to decide it.

Numerous errors are alleged in the motion for a new trial, all of which have been elaborately discussed in the briefs of counsel on both sides. But the questions thus presented may not arise again, and hence we deem it unnecessary to extend this opinion for their consideration and decision.

For the error in overruling the demurrer to the fourth paragraph of the complaint, the judgment is reversed, and the cause remanded, with instructions to the trial court to sustain the demurrer thereto.

 Daniels v. The State.

DANIELS v. THE STATE.

[No. 18,467. Filed April 23, 1898.]

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INTOXICATING LIQUORS—"Quart Shop" Law.—*No Penalty Provided in Act.*—*Penalty Prescribed by General Statute.*—The act of March 8, 1897 (Acts 1897, p. 253), commonly known as the "Quart Shop" act, making unlawful the sale of liquors in less quantities than five gallons without a county license, is not rendered ineffective by its failure to prescribe a penalty for its violation, as the penalty is supplied by the general provision of section 2186, Burns' R. S. 1894. pp. 350-358.

STATUTORY CONSTRUCTION.—*Incomplete Statute.*—The rule that general statutes give way to special statutes upon the same subject, applies only when the special statute is complete within itself. p. 368.

SAME.—*Doing Business Without License.*—*Statute Applicable to Future Legislation.*—In section 2186, Burns' R. S. 1894, prescribing a penalty for the transaction of any business without a license when such license is required by law, the words of the statute are comprehensive, and apply as well to future as existing legislation. p. 368.

INTOXICATING LIQUORS.—"Quart Shop" Law.—*Constitutional Law.*—Section 3 of the act of March 8, 1897, providing that "none of the provisions of the act shall apply to any person engaged in business as a wholesale dealer, who does not sell in less quantities than five gallons at a time," does not discriminate in favor of wholesale dealers, so as to violate section 1, article 14, of the federal constitution. pp. 361-363.

From the St. Joseph Circuit Court. *Affirmed.*

F. J. L. Meyer, D. W. Howe, Breen & Morris, A. G. Smith, C. A. Korbly, R. O. Hawkins and H. E. Smith, for appellant.

W. A. Ketcham, Attorney-General, T. W. Slick, John R. Wilson and Merrill Moores, for State.

HACKNEY, J.—This was a prosecution against the defendant for having sold, without a license, one quart of beer on the 1st day of May, 1897. The prosecution, it is conceded, was for one of the offenses defined by the first section of the amendatory act of 1897, Acts 1897, p. 253.

Daniels v. The State.

That act amended sections one, five, and seven of the act approved March 17, 1875, being sections numbered 5312, 5316, 5318, of R. S. 1881, and sections numbered 7276, 7281, 7283, Burns' R. S. 1894.

Prior to the amendment it was made unlawful to sell intoxicating liquors, in less quantity than one quart at a time or in any quantity to be drunk upon the premises, without first procuring a license according to the provisions of said act of 1875. The penalty for the violation of said provisions was prescribed by section 12 of said act. Section 7285, Burns' R. S. 1894 (5320, R. S. 1881), which is as follows: "Any person, not being licensed according to the provisions of this act, who shall sell or barter, directly or indirectly, any spirituous, vinous, or malt liquors in a less quantity than a quart at a time, or who shall sell or barter any spirituous, vinous, or malt liquors to be drunk, or suffered to be drunk, in his house, out house, yard, garden, or the appurtenances thereto belonging, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than twenty dollars nor more than one hundred dollars, to which the court or jury trying the cause may add imprisonment in the county jail of not less than thirty days nor more than six months."

The amendatory act of 1897 prescribed no penalty, and its first section provides that, "It shall be unlawful for any person, directly or indirectly, to sell, barter or give away, for any purpose of gain, any spirituous, vinous, or malt liquors without first procuring from the board of commissioners of the county in which such liquor is to be sold, a license as hereinafter provided; nor shall any person, without having first procured such license, sell or barter any intoxicating liquor to be drunk, or suffered to be drunk, in his house, outhouse, yard, garden, or the appurtenances thereto belonging."

Daniels v. The State.

Section two prescribes the license fee required to be paid, and section three provides that upon the granting of a license, the payment of the fee, etc., the "Auditor shall issue a license to the applicant for the sale of such liquors as he applied for, with the privilege of permitting the same to be drunk on the premises * * * which license shall specify the name of the applicant, the place of sale, and the period of time for which such license is granted: *Provided*, That none of the provisions of this act shall apply to any person engaged in business as a wholesale dealer, who does not sell in less quantities than (5) gallons at a time."

It is manifest that the provisions of the old act have been so amended as to make unlawful all sales of intoxicating liquors, made without a license, regardless of quantity, saving and excepting no class other than those mentioned in the proviso just quoted, namely: Those wholesale dealers who do not sell in less quantities than five gallons at a time. It is manifest, also, that the penalty section of the act of 1875, quoted above, does not apply to sales where the quantity sold is not less than one quart at a time. In other words, the sale charged in this case, one quart, does not fall within the penalty prescribed by said section 7285, Burns' R. S. 1894, the penalty there prescribed being for sales in less quantities than one quart at a time, or sales of liquor to be drunk upon the premises. We are not to consider, in this case, the effect of section 7285, *supra*, upon sales of quantities of less than one quart at a time.

One objection here pressed is that no penalty is prescribed for the sale charged in this case, and this is certainly correct, so far as the last mentioned section is concerned.

On behalf of the appellee, however, it is contended

Daniels v. The State.

that section 2186, Burns' R. S. 1894 (2090, R. S. 1881), prescribes the penalty applicable to the offense charged against the appellant. That section, enacted in 1881 as a part of the chapter (5) defining crimes and prescribing punishments, is as follows: "Whoever, by himself or agent, transacts any business or does any act without a license therefor, when such license is required by any law of this State, shall be fined not more than two hundred dollars nor less than five dollars."

Against this contention counsel for appellant insist, (1) that this section cannot be extended to offenses which did not exist when it was enacted; (2) that there being a special statute upon the subject, namely, the act of 1875, as amended in 1897, the general provision, that of section 2090, must give way to the special provision, and, (3) that the legislative expression, by the act of 1875, and the amendment thereof in 1897, included such violations as were deemed subject to penalties, and, that, under the rule that the expression of one thing excludes all others, excluded all penalties not specifically provided.

To the first of these propositions are cited by counsel for the appellant *Reg. v. Smith*, L. R. 1 Crown Cas. 266; *Commonwealth v. Wells*, 110 Pa. St. 463; *Commonwealth v. Erie, etc., R. R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471; *Hall v. State*, 20 Ohio 8; *United States v. Paul*, 6 Peters 141.

The case of *United States v. Paul*, *supra*, involved an act of congress expressly incorporating state legislation of a penal character, and was held not to apply to subsequent legislation of the state of the same general character as that so incorporated. There are many like cases, and the holding must be sound, upon the theory that congress will not blindly enact future legislation of a state, and will, at most, but adopt

Daniels v. The State.

existing legislation. In *Hall v. State, supra*, it is broadly stated as a rule of construction, that "a statute referring to, or affecting persons, places or things, is limited in its operations, to persons, places or things, as they existed at the time the statute was passed." Such a rule of construction would be so narrow as to limit the operation of statutes to persons born before their enactment, and to places or things falling within its classification prior to and at the time of their enactment. The case of *Commonwealth v. Erie, etc., R. R. Co., supra*, we do not regard as in point. All of these cases depend upon the severest enforcement of the rule of strict construction, and some of them we regard as in conflict, not only with the weight of authority, but with the greater weight of reason.

The rule of strict construction as first introduced and applied for many years, has in modern times been undergoing modifications which look to the intention of the lawmaker instead of requiring perfect precision. As is said in *Hardcastle on Construction of Statutes*, p. 250, "‘A hundred years ago,’ said the court in *Lyon’s Case*, Bell’s C. C., 45, ‘Statutes were required to be perfectly precise, and resort was not had to a reasonable construction of the act, and thereby criminals were often allowed to escape. This is not the present mode of construing acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature.’ Therefore, ‘although the common distinction,’ as Pollock, C. B., said in *Nicholson v. Fields*, 31 L. J. Ex. 235, ‘taken between penal acts and remedial acts, that the former are to be construed strictly, and the others are to be construed liberally, is not a distinction, perhaps, that ought to be erased from the mind of a judge,’ yet the distinction now means little more than ‘that penal

Daniels v. The State.

provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment, the courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other equally refusing by any mere verbal nicety, forced construction, or equitable interpretation to exonerate parties plainly within their scope.'” Continuing, the author says, “This was clearly pointed out by the judicial committee in *The Gauntlet*, L. R. 4 P. C. 191. ‘No doubt,’ said they, ‘all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offense is within the plain meaning of the words used, and the court must not strain the words on any notion that there has been a slip, or a *casus omissus*, or that the thing is so clearly within the mischief that it must have been intended to be included, and would have been included if thought of. On the other hand the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument according to the fair common-sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.’

“‘It is not true,’ said Buller, J., in *Rex v. Hodnett*, 1 T. R. 101, ‘that the court in the exposition of penal statutes are to narrow the construction. We are to look to the words in the first instance, and, where they are plain, we are to decide on them.’ Consequently, ‘when large enough words are used,’ a prohibition

Daniels v. The State.

may be extended so as to apply to something which has come into existence since the passing of the act. Thus in *Graves v. Ashford*, L. R. 2 C. P. 410, it was held that the piracy of a picture by means of photography is within the statutes of Geo. II and Geo. III, which were passed for the protection of artists and engravers, although photography was not a known art at the time those statutes were passed."

The authorities which we regard as in conflict with this contention of counsel are *State v. Kidd*, 74 Ind. 554; *Mercer v. Corbin*, 117 Ind. 450, 10 Am. St. 76. *State v. Buskirk*, 18 Ind. App. 629; *United States v. Nichols*, 27 Fed. Cas. No. 15,880; *United States v. Barton*, 24 Fed. Cas. No. 14,534; *State v. Hays*, 78 Mo. 600; *Campbell v. People*, 8 Wend. 636; *State v. Becton*, 7 Baxter 138; *Graves v. Ashford*, *supra*; *Gambart v. Ball*, 14 C. B. (N. S.) 306; *Taylor v. Goodwin*, 4 Q. B. Div. 228; *Collier v. Worth*, L. R. 1 Exch. 464; *Attorney-General v. Saggors*, 1 Price 182; *Williams v. Drewe*, Willes 392; *In re Lloyd*, 51 Kan. 501, 33 Pac. 307; *Hardcastle on Statutes*, *supra* (2d ed.), p. 252; *Maxwell on Interpretation of Statutes* (2d ed.), p. 93.

The last named author makes this statement: "Except in some few cases where a statute has fallen under the principle of excessively strict construction, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it. Thus, the provision of Magna Charta which exempts lords from the liability of having their carts taken for carriage was held to extend to degrees of nobility not known when it was made, as dukes, marquises, and viscounts. The 17 Geo. 2 (A. D. 1744), which gave parishioners the right of inspecting the

Daniels v. The State.

accounts of church-wardens and overseers under the poor law of Elizabeth, was held to extend to those of guardians, officers who were created by Gilbert's Act (22 Geo. 3), passed in 1783. The 13 Eliz. c. 5, which made void, as against creditors, transfers of lands, goods, and chattels, did not originally apply to copyholds or choses in action, as these were not seizable in execution; but when they were made subject to be so taken (1 and 2 Vict. c. 110), they fell within the operation of the act. The Act of Geo. 2, which protects copyright in engravings by a penalty for piratically engraving, etching, or otherwise, or 'in any other manner' copying them, extends to copies taken by the recent invention of photography." The author cites some cases already cited by us, and many others.

In *State v. Hays, supra*, it was held that a township trustee, holding his office under an act for the creation of townships, was subject to criminal prosecution under a prior statute defining the crime of embezzlement by public officers, and prescribing punishment therefor.

In *Taylor v. Goodwin, supra*, an old statute forbade the driving of "any sort of carriage * * * furiously, so as to injure life or limb of any passenger," and it was held that one riding a bicycle furiously upon the highway was subject to the penalties of the statute, although bicycles were unknown at the time the statute was enacted.

In *re Lloyd, supra*, a general statute of 1868 made attempts to commit offenses punishable. At that time the age of consent was ten years. In 1887 the age of consent was made eighteen years, and it was held, criticising the cases of *Hall v. State, supra*, and *United States v. Paul, supra*, that the earlier statute applied, notwithstanding the later change in the age of consent.

Daniels v. The State.

United States v. Nihols, supra, was a prosecution for perjury under sections 1 and 7 of the bankrupt law of 1841. At that time an act of 1825 was in force, defining perjury and prescribing a penalty. It was insisted that the act of 1825 did not govern cases of false swearing under the subsequent act. The court said, "The act of 1825 is an act defining the crime of perjury generally; and is not confined in its operation to acts passed anterior to that time, but is applicable to false swearing under the bankrupt law, as well as in other cases. The bankrupt law must be construed with the act of 1825, as in *pari materia*."

Our own case of *State v. Kidd, supra*, involved a question directly analogous to that here under consideration. An act of 1877 made it unlawful to sell liquors "upon the day of any State, county, township, primary or municipal election." An act of 1879 provided that town trustees contemplating the building of water-works should submit the question to the voters of the town at a special or general election. It was held that a sale of liquor upon the day of an election as to the building of water-works was punishable under the act of 1877. The court, speaking by Woods, J., said: "It may be noted that the law authorizing the holding of such an election was not enacted until two years after the passage of the law under which the prosecution was instituted, and on this fact it may have been held that the law defining the offense should be construed to include only such election days as were then known to the law, and that the act providing for new elections could not enlarge the scope of a criminal statute theretofore enacted. This argument, if admitted, proves too much. The times for holding elections have been, and doubtless will be frequently changed, but it has not been deemed necessary on that account to change or re-

Daniels v. The State.

enact the penal or criminal statutes which relate thereto. The general terms of these statutes are such as to preserve their force and applicability notwithstanding the changes made in other laws. The language of the law under consideration is as general and comprehensive as it could well have been made, and may as well apply to elections since provided for as to those which were authorized by the laws existing at the time of its passage, and to elections concerning water-works proposed to be erected in the municipality as to an election of municipal officers."

In the case of *Mercer v. Corbin*, *supra*, the act of 1859 (Acts 1859, p. 185), making it "unlawful for any person to ride or drive upon a brick, stone, plank, or gravel sidewalk in any town or village," and declaring it a misdemeanor punishable by fine, it was held that a bicycle must be regarded as a vehicle within the meaning of that statute. While not directly discussed, it is a matter of common knowledge that the bicycle was not in use at the time of the enactment of the statute, and the conclusion reached by the court could be supported only upon the theory that the act was intended to comprehend, not only existing vehicles, but such as might thereafter be known, and come into use.

Another rule of construction which leads strongly to the conclusion that section 2090, *supra*, supplies the penalty for the sale charged in this case, is that "statutes which are not inconsistent with one another and which relate to the same subject-matter, are in *pari materia*, and should be construed together and effect be given to them all, although they contain no reference to one another and were passed at different times." 23 Am. and Eng. Ency. of Law, p. 311, and the many authorities there cited. It is perhaps true that this rule of construction does not apply to a special statute, which is complete and comprehends the whole

Daniels v. The State.

subject to which it is directed. *Harold v. State*, 16 Texas App. 157. But we are here dealing with a statute, which, though special, is not complete within itself. It may be here said that the rule insisted upon by counsel for the appellant, that general statutes give way to special statutes upon the same subject, applies also only when the special statute is complete within itself.

The rule that statutes, when *pari materia* should be construed together, suggests that we should look into the body of the law, and where it may be ascertained that some part of the law is ineffective without considering some other part thereof, we should look to such other part for the purpose of giving effect to the whole, as well as to ascertain the legislative intention. Legislative intention, as is well understood, is the first principle of statutory construction, and if any interpretation and construction can be reasonably made which will save an enactment of the legislature from a barren and meaningless purpose, it should be accepted. The courts have no power, of course, to supply omissions, or add to the clearly expressed terms of a statute, as, if section 2090, *supra*, were not in the statute, the courts could not save the act of 1897 from the charge of omitting a penalty. The act of 1897, the act of 1875 and the act of 1881 relate to licenses, and are a part of the body of the criminal laws of the State. The new requirement of a license is but an added species, and is not a departure from the genus or general subject of legislation comprehended within the three acts. The penalty section from the act of 1881 (section 2090, *supra*), contains no words indicating an intention to apply its provisions only to existing enactments. Its words are "when such license is required by any law of the State." These words are large and comprehensive, and apply as well to future as existing requirements.

Daniels v. The State.

In the case of *Hoagland v. State*, 17 Ind. 488, as to the application of present legislation to future legislation, we have a construction upon the character of the words employed, as indicating the intention of the legislature. There such words were found too narrow to include future legislation, but it was indicated that larger words would include such future legislation.

To the second proposition of appellant are cited *Keiser v. State*, 78 Ind. 430, and *Walter v. State*, 105 Ind. 589. These cases hold that section 2090, being a general provision, does not repeal the special penalty section of the act of 1875, and in this respect are not at variance with the general rule already stated, that a general provision will yield to a special statute, complete and fully covering a specific question. We are now dealing with a question, however, in which the special statute is not full and complete, but omits the very element upon which we are to determine if the general statute applies. It is true that it was said in *Walter v. State*, *supra*, that section 2090 "ought to be construed as having reference to classes of business other than the sale of intoxicating liquors." That statement was clearly correct, upon the assumption that the subject of licenses for the sale of intoxicating liquors, and the penalties prescribed therefor, was covered by the act of 1875. In the case of *Keiser v. State*, *supra*, it was said that section 2090 should "be construed as applying to any transaction, business or trade, for which the law requires a license, without providing a special penalty for failing to obtain it." This statement, while not directed specifically to the question of past or future legislation, applies as well to requirements concerning liquor licenses as for any other purpose. Further than this we regard the two

Daniels v. The State.

cases mentioned as of no force upon the question here under consideration.

In order to consider further questions presented, it becomes necessary to determine the classes of persons to whom the body of the liquor laws of the State now apply. There has been no time when the laws of the State attempted to regulate the traffic as between the manufacturer, the wholesale dealer or the jobber, and the retail dealer. All legislation has been directed to restricting and controlling sales to the consumer and, until the act of 1897, has applied only to the retail dealer, or to one selling in quantities less than one quart at a time. Considering all existing legislation upon the subject, including the act of 1875, the Nicholson law, and the act of 1897, we find nothing changing the general trend and object of the legislation of the State upon the subject. The license now required and issued is not only with reference to sales to consumers, but every holder thereof may sell for consumption at the time and place of sale. Provisions as to notice of application for license, as to location of room, regulations as to screens, etc., all disclose an intention to restrict the trade with consumers and to detect unauthorized sales to them. The license features of existing laws have not even a remote application to sales by the brewer, distiller, or the wholesale dealer to the retail dealer. If they did apply, the brewer, before selling and delivering less than five gallons of beer or ale to the saloon-keeper, would be required to procure a license authorizing him to sell beer or ale by the drink for consumption upon the premises, and would be subject to all of the restrictions with reference to location of business, screens, etc., as applied to the saloon. The same would be true with reference to distillers and others who make sales to retail dealers. The scope of our laws upon

Daniels v. The State.

the subject, we have no doubt, includes only such dealers as sell to consumers, and must be construed with reference to such class or classes. If the brewer, the distiller, the druggist, or the wholesale dealer, selling less than five gallons at a time, desires to sell to the consumer, he must procure a license just as the retail dealer, the "quart shop" or the "jug house" is required to do.

The argument against the injustice of requiring the same steps to procure a license, the payment of the same license fee, etc., that the saloon-keeper is required to take or pay, should have some force if made to the General Assembly, for we feel that the interests of the liquor trade and the cause of temperance should recognize a distinction between the licensing and regulating of the saloon and the drug store or the dealer who sells for home consumption. It is probably detrimental to the cause of temperance to require the druggist to convert his business into a saloon at which sales by the drink may be made, before he may sell a quart or more of beer, wine, or whisky to be carried to the home of the consumer for use as he may desire it. But this argument is not of value when addressed to the courts, since it does not involve the validity of the law and relates alone to the wisdom or propriety of the legislation, subjects over which the courts have no control.

It is said that section 1, article 14, of the constitution of the United States is violated by section one of the act of 1895 (Acts 1895, p. 248), in discriminating "against wholesale dealers, corporations and druggists" who may not enjoy on the same terms privileges granted to saloon-keepers.

Section one of the act referred to relates to the description which an applicant for license shall give of the location and room wherein he desires to sell, and

Daniels v. The State.

contains the proviso "that no license shall be granted to any other than a male person over the age of twenty-one years, and one who shall at the time be of good moral character, and provided further, that no such person shall be deemed to be of good moral character if within two years of the time when such application is made he shall have been adjudged guilty the second time of violating any of the provisions of this act."

If this proviso is discriminating, there is nothing in the record disclosing that such discrimination affects the appellant as a "wholesale dealer," "corporation," or "druggist." Its discrimination is as to sex, age, and moral character, neither of which appears to have prevented the appellant from enjoying the same privileges of a license on the same terms granted to any saloon-keeper. Counsel certainly misapprehend the force of the provision quoted.

Section three of the act of 1897 is attacked also as violating the same section and article of the federal constitution, in that it provides that none of the provisions of the "Act shall apply to any person engaged in business as a wholesale dealer, who does not sell in less quantities than five (5) gallons at a time" and thereby discriminates in favor of wholesale dealers, who are permitted to make sales without a license, while a retail dealer is not permitted to make a like sale without a license. This is said to be an arbitrary and unreasonable classification, while it is conceded that a reasonable classification is proper.

As we have construed the law, everyone who desires to sell to consumers must take out the license required, unless he shall desire to sell in quantities of five gallons or more, in which event no license is required. As between those who can have a license there is no opportunity for discrimination. Whether he is a druggist, a brewer, distiller, or other manu-

Daniel v. The State.

facturer or dealer, if he sells in quantities of five gallons or more he is a wholesale dealer, and if he sells to consumers, in quantities less than five gallons at a time, he is required to take out a license.

The only discrimination, therefore, is as to the person who is permitted to obtain a license. Nothing in the record suggests even a presumption that the appellant could not obtain, upon equal terms with anyone, a license to sell at retail, or in quantities less than five gallons, such as he is here charged with making. As held in *Wagner v. Town of Garrett*, 118 Ind. 114, the appellant may not complain that he can enjoy privileges which others cannot enjoy.

However, we have no doubt that the concession of the appellant that the legislature may make a reasonable classification is correct. The sale of intoxicants has always been held subject to control by the police power of the State. The police power belongs to the State, and not to the federal government. In its exercise the State may make such regulations as will promote the health, morals, and good order of society. Questions of sex, age, and moral fitness as applied to the traffic have always been regarded as proper subjects of legislative control, and, if the appellant could complain that corporations were not permitted to take out a license, we may suggest, without deciding, that it is not an unreasonable restriction which requires that the holder of a license to conduct a business fraught with so many dangers shall be one subject to the processes of the law and the enforcement of criminal punishment, one whose identity may not be so confused with that of his associates in business as to make it difficult, if not often impossible, to detect abuses, and visit the prescribed punishment upon the offender. The judgment of the lower court is affirmed.

Lowry v. Downey et al.

LOWRY v. DOWNEY ET AL.

[No. 18,549. Filed April 26, 1898.]

PRACTICE.—*Harmless Error.*—No error was committed in overruling a demurrer to an insufficient paragraph of complaint, where the special findings affirmatively disclose that the judgment rests wholly upon another paragraph. *p. 365.*

VENDOR'S LIEN.—*Exchange of Property.*—Where, in an exchange of real estate, one of the parties agreed as a part consideration of the trade that she would pay off and discharge certain liens against the property conveyed by her, upon her failure to do so the grantee may pay off and discharge such liens, and recover from her the amount thereof as the balance of purchase money of the real estate taken in exchange, and enforce a vendor's lien therefor on the real estate conveyed to her. *pp. 365-369.*

DEEDS.—*Consideration.*—Where the consideration in a deed is stated in general terms, the true consideration may be shown by parol by either party, for any purpose, except to defeat the operation of the deed as a valid and effective grant, and it may be shown by such evidence that grantee verbally agreed as a part of the consideration to pay an incumbrance existing on the real estate conveyed. *p. 369.*

EVIDENCE.—*When Not in Record.*—*Bill of Exceptions.*—The evidence is not properly in the record, where it is not shown that the bill of exceptions containing the evidence was filed with the clerk or in open court. *p. 370.*

From the Howard Circuit Court. *Affirmed.*

L. J. Kirkpatrick, J. F. Morrison and T. C. McReynolds, for appellant.

John E. Moore and Freeman Cooper, for appellees.

JORDAN, J.—Appellees filed in the lower court a complaint in two paragraphs against the appellant, for the recovery of money, and to enforce a vendor's lien against the real estate described in the complaint. Appellant demurred to each of these paragraphs, which demurrer was overruled and exception duly reserved. There was an answer and reply filed by the parties respectively, and the issues as joined were tried by the court, and by request there was a special

Lowry v. Downey et al.

finding of facts and conclusions of law thereon, upon which the court, over appellant's exceptions, and over her motion for a new trial, rendered judgment in favor of appellee for \$160.00, and for a foreclosure of the vendor's lien.

The errors assigned are: (1) That the court erred in overruling the demurrer to each paragraph of the complaint; (2) that the court erred in its conclusions of law; (3) in overruling the motion for a new trial.

We need not stop to consider the sufficiency of the first paragraph of the complaint, as the special finding affirmatively discloses that the judgment rests wholly on the second paragraph, and under such circumstances, even though the insufficiency of the first paragraph be conceded, the overruling of the demurrer thereto would not be available error. *Burkam v. Burk*, 96 Ind. 270; *Evansville, etc., R. R. Co. v. Maddux*, 134 Ind. 571; *Putt v. Putt*, 149 Ind. 30; *Elliot's App. Proc.*, section 637.

The second paragraph of the complaint alleges facts which, in substance, are as follows: The plaintiffs on the 29th day of October, 1894, were the owners in fee simple of certain described real estate situated in the city of Kokomo, Howard county, Indiana, which on that day they sold and conveyed by warranty deed to the defendant, Irene Lowry, for the consideration of \$7,700.00. That the plaintiffs were to receive in consideration for the conveyance of the said real estate to the defendant other real estate described in the complaint, situated in the city of Frankfort, in Clinton county, Indiana, the same to be conveyed to the plaintiff by the defendant, subject to a mortgage lien existing thereon for \$1,800.00, held by one Zimmerman, and also to be subject to the taxes for 1894, but subject to no other liens. This agreement, it is averred, was reduced to writing, and signed

Lowry v. Downey et al.

by the plaintiffs and the defendant, Mrs. Lowry, and also by her husband. After the execution of this contract by the parties, and before the execution by the plaintiffs of the deed conveying their Kokomo property to the defendant, it was discovered that certain other mortgage and judgment liens existed against the Frankfort property which Mrs. Lowry was to convey to the plaintiffs in consideration of the property to be conveyed to her by them. These liens were not mentioned in the contract, nor were the plaintiffs under its terms obligated to either pay the same or take the real estate to be conveyed to them by Mrs. Lowry subject thereto. After the plaintiffs became aware of the existence of these liens they declined to proceed any further in the transaction, or to close the trade by the delivery of the deed to the defendant for their Kokomo property until the liens in question were paid by the defendant, or provisions for their payment and satisfaction made by her. Thereupon the defendant, Mrs. Lowry, in order to induce the plaintiffs to complete the trade, and for the purpose of obtaining the title from the plaintiffs to the Kokomo property, verbally agreed with and promised them that as a part of the consideration for the said property she would fully pay off and discharge and satisfy these liens which existed on her Frankfort property within ten days thereafter. This promise and obligation, made upon the part of Mrs. Lowry, was accepted by the plaintiffs, and thereupon, on account of the same, plaintiffs were induced to and did deliver to the said defendant a deed for their property in Kokomo whereby the title to the same was conveyed to said defendant. It is alleged that the defendant wholly failed to keep her said promise to pay off and discharge said liens, and that the plaintiffs, in order to protect the Frankfort property which the

Lowry v. Downey et al.

defendant had conveyed to them, were finally compelled to and did pay off and satisfy these liens, and that no part of the money so paid by them in the discharge and satisfaction of the liens has been repaid by the defendant, and that the money so paid is now due and wholly unpaid, to the amount of \$400.00. The fact that the defendant is insolvent, and that she has no property other than that conveyed to her by the plaintiffs, is shown, and the prayer is for a judgment against the defendant for the money alleged to be due the plaintiffs as purchase money, and that a vendor's lien be declared and foreclosed against the real estate so conveyed by them to the defendant.

Counsel for appellant claim that the paragraph is not sufficient on demurrer for the reason that the parol agreement relied on was merged in the deed of conveyance executed by the appellees to appellant, and, as it does not appear that this deed provided for the payment by the appellant of the liens in controversy "as a part consideration of the purchase money," therefore, it is said that the pleading is not sufficient to enforce a vendor's lien. Appellees contend, however, that they are not seeking to change the terms or provisions of any written contract or deed by a previous or contemporaneous parol agreement, but are only seeking to show thereby what the real and true consideration was which entered into the execution of the deed conveying their real estate to appellant. It may be said that the facts alleged in the second paragraph show that the transaction or deal between the parties to this action was in the nature of an exchange of property. By the averments of the pleading it is disclosed that under the terms of the written contract, executed prior to the verbal agreement in dispute, appellees were to accept from appellant a deed of conveyance to her property

Lowry v. Downey et al.

situated in the city of Frankfort subject to a certain mortgage lien, and also subject to the lien of the taxes of 1894, but this property was not to be taken by appellees subject to any other lien or liens. They were to accept it, as previously agreed, as the consideration for the conveyance to appellant of the Kokomo property. Before the final transfer of the latter to appellant, however, it was ascertained that the liens in controversy existed against the Frankfort property in addition to those subject to which appellees had by the original contract agreed to accept said property. The latter, on discovering these additional liens, it appears, refused to proceed further in the matter until appellant either paid and satisfied such liens or made provisions for their payment. In order, then, as it is shown, to induce appellees to consummate the deal, and finally execute to appellant a deed, which they did, for the real estate in Kokomo, the latter verbally agreed to pay and satisfy the liens in question within ten days, as a part of further consideration for the conveyance of the latter property to her. We think it reasonably appears from the facts that under the parol agreement the payment and discharge of these liens by appellant expressly became a part of and entered into the consideration upon which the conveyance of the Kokomo property rested, and the failure of appellant to comply with her agreement to pay and satisfy them, and thereby relieve the property from these incumbrances, must be considered as a default on her part to pay the purchase price of the real estate in dispute, to the amount due upon the liens, principal and interest; and appellees having paid this amount, and satisfied the liens, would be entitled, under the circumstances, to proceed against appellant for the recovery of the amount so paid, and to enforce a vendor's lien on the realty conveyed

Lowry v. Downey et al.

to her. It is the settled rule in this State that where the consideration in a deed is stated in general terms, the true or real consideration may be shown by either party for any purpose, by parol evidence, except to defeat the operation of the deed as a valid and effective grant, and it may be shown by such evidence that the grantee verbally agreed as a part of the consideration to pay an incumbrance existing on the real estate conveyed. *Levering v. Shockley*, 100 Ind. 558; *Hays v. Peck*, 107 Ind. 389, and authorities cited. Under the facts, this case comes fully within this doctrine.

As a general rule, all preliminary negotiations between the parties leading up to the execution of a deed, with some exceptions, are merged in the deed; but this rule, under our decisions, does not apply to the consideration, except where the instrument specifically sets forth the consideration.

In *Hays v. Peck*, *supra*, Elliott, J., speaking as the organ of this court, said: "It is an elementary doctrine that the consideration of a deed may be shown by parol, and it is impossible to give effect to this doctrine without permitting the parties to prove what agreement as to the consideration preceded the execution of the deed. The agreement as to the consideration necessarily precedes the execution of the deed, and the fact that the consideration was agreed upon some time prior to the delivery of the deed does not preclude the grantor from showing what constituted the consideration of the deed. To hold otherwise would be to run counter to the rudimentary doctrine that it is always competent to prove the actual consideration yielded for the conveyance of land." See, also, *Pickett v. Green*, 120 Ind. 584; *Nichols, etc., Co. v. Burch*, 128 Ind. 324; *Smith v. Mc-*

Gates et al. v. Haw et al.

Clain, 146 Ind. 77; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109.

The second paragraph of the complaint is sufficient, and there was no error in overruling the demurrer thereto.

The facts stated in the special finding fully support those set up in the second paragraph of the complaint, and sustain the trial court's conclusions of law.

The evidence is not before us, for the reason that it does not appear from the record that the bill of exceptions said to contain it, was filed with the clerk, or in open court. This is essential. See act approved March 8, 1897 (Acts 1897, p. 244); *Müller v. Evansville, etc., R. R. Co.*, 143 Ind. 570; *Drake v. State*, 145 Ind. 210.

The evidence not being in the record, we cannot consider nor review any questions depending thereon which appellant seeks to present.

There being no available error, the judgment is affirmed.

GATES ET AL. v. HAW ET AL.

[No. 18,827. Filed April 27, 1898.]

APPEAL. — Bill of Exceptions. — Agreed Statement of Facts. — Evidence.

—A bill of exceptions stated that the cause was submitted to the court on an agreed statement of facts, which statement is recited. Immediately following the statement of facts the bill stated "that the above agreed statement of facts contains all the facts agreed upon, and which were admitted to the court, and all the facts heard or considered by the court in the determination of the cause." *Held*, that the language of the bill of exceptions showed that the agreed statement was all the evidence given in the cause. *pp.* 371-373.

INTOXICATING LIQUORS. — "Nicholson Law." — License. — The fact that the situation and condition of the room in which an applicant for a license desires to sell intoxicating liquors is such that the sales of liquor therein would be unlawful, under section 4, of the act of March 12, 1895, providing that the room shall be so arranged that all parts of it can be seen from the street or highway, is not a ground for refusal to grant such license. *pp.* 377, 378.

150	370
163	547
150	370
168	563

Gates et al. v. Haw et al.

From the Hancock Circuit Court. *Affirmed.*

N. R. Spencer and E. J. Binford, for appellants.

Charles Downing, W. A. Hough and R. A. Black,
for appellees.

MCCABE, J.—This was an application to the board of commissioners of Hancock county by the appellees to obtain a license to sell intoxicating liquor in a less quantity than a quart at a time to be drank on the premises. From the determination of said board there was an appeal to the circuit court. The appellants remonstrated on the ground, among others, that the room in which it was proposed to conduct such sales was so situated and constructed as that such sales therein would violate the fourth section of the Nicholson law. Acts 1895, p. 250. A trial of the case in the circuit court resulted in a finding for the applicants, and judgment awarding a license to them, as prayed for, over appellants' motion for a new trial on the ground that the finding was contrary to law.

Error is assigned on the action of the circuit court in refusing a new trial. The trial was upon an agreed statement of facts. It was not in the form of an agreed case under the statute, but the facts agreed upon, took the place of the evidence, as was the case of *City of Shelbyville v. Phillips*, 149 Ind. 552, and cases there cited.

But we are met with the objection that the bill of exceptions incorporating the agreed statement of facts does not show that such facts constituted all the evidence given in the cause, and the case just cited is referred to as authority for so holding. This case, however, is somewhat different from that. It was stated in the bill of exceptions here that: "The cause was submitted to the court for trial without the intervention of a jury on the following agreed state-

Gates et al. v. Haw et al.

ment of facts. * * * The parties hereto hereby stipulate by their respective attorneys that for the purpose of the trial of this cause, the following facts are agreed upon and admitted;" and then follows the statement of facts. Immediately following the statement of facts the bill states: "That the above agreed statement of facts contains all the facts agreed upon and which were admitted to the court, and all the facts heard or considered by the court in the determination of said cause." It is insisted by the appellees that this language does not show that the agreed statement of facts contains all the evidence given in the cause. It is true there is a broad distinction, as a general rule, between evidence and facts. Webster defines the word "fact" to be an effect produced or achieved. And he defines the word "evidence" to mean that which is legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it. It is said in note 4, 7 Am. and Eng. Ency. of Law, p. 658, that, "Facts constituting a cause of action are those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of the fact." To illustrate further the distinction between a fact and evidence it is said by Ram on Facts, p. 5, that: "A fact, once in complete existence, once ended, admits of no addition, no subtraction; 'nothing can be put to it, nor anything taken from it;' once in existence, it is irrevocable." Not so with evidence tending to prove a fact. It may be added to or subtracted from, weakened, strengthened, or destroyed. So that it may be conceded that a fact is one thing and evidence is quite a different thing, as a general rule. That competent evidence always tends to prove or disprove an alleged fact in dispute. But it may sometimes happen that the fact in issue

and the evidence of that fact are one and the same thing. *Louisville, etc., R. W. Co. v. Miller*, 141 Ind. 533. As to the distinction between the facts and the evidence, see *Boyer v. Robertson*, 144 Ind. 604.

It is a common thing for members of the legal profession to use the words facts and evidence as synonymous, and in some instances we have seen the fact and the evidence thereof is one and the same thing. In view of all this, and the whole of the language quoted from the bill of exceptions, it is apparent that the word facts was used for the purpose of conveying the same meaning as the word evidence, and the court and counsel manifestly meant by the word "facts" the evidence; and in such a case it is our duty so to construe the language. *Harris v. Tomlinson*, 130 Ind. 426. And so construing the language, it is clear that the agreed statement was all the evidence given in the cause. And the bill of exceptions incorporating the agreed statement being properly in the record, it appears that all the evidence given in the cause is properly before us.

The objection, and the sole objection, urged to the finding is that the situation and condition of the room is such as would make it unlawful to sell therein.

It is conceded that the agreed facts entitled appellees to the license, unless the situation and arrangement of the room was such as that a sale therein would violate section 4 of the act in question. And appellants insist that such was the arrangement and situation of the room, and hence that appellees were not legally entitled to a license, and therefore the finding that they were, was contrary to law.

The appellees, however, contend, that even though such was the situation and arrangement of the room, nevertheless, that was not a sufficient legal objection to defeat their application. And they further con-

Gates et al. v. Haw et al.

tend that the agreed statement of facts fails to show that the arrangement and situation of the room are such as that sales therein would violate said section. It reads thus: "Any room where intoxicating liquors are sold by virtue of a license issued under the law of the State of Indiana, for the sale of spirituous, vinous, malt, or other intoxicating liquors in less quantities than a quart at a time, with permission to drink the same upon the premises, shall be situated upon the ground floor or basement of the building where the same are sold, and in a room fronting the street or highway upon which such building is situated, and said room shall be so arranged, either with window or glass door, as that the whole of said room may be in view from the street or highway, and no blinds, screens, or obstructions to the view shall be arranged, erected, or placed so as to prevent the entire view of said room from the street or highway upon which the same is situated during such days and hours when the sales of such liquors are prohibited by law. Upon conviction for the violation of this or either of the foregoing sections of this act the defendant shall be fined in any sum not less than \$10.00 nor more than \$100.00, to which may be added imprisonment in the county jail not exceeding ninety days, and in case of conviction for the second offense either upon a plea of guilty or conviction upon trial thereof, in any circuit, superior, criminal, justice, or police court of Indiana, as a part of the judgment, the court may make an order revoking the license of the person convicted, which said judgment shall have the effect to completely annul and set aside such license, and all privileges and rights under the same. And upon the third conviction or plea of guilty entered, the court rendering judgment thereon shall annul and set aside such license and all privileges and rights under the same." This section clearly

Gates et al. v. Haw et al.

contemplates that a license may be granted to the applicant, even though a sale under such license may violate some of the provisions of the section. Because it provides for a fine of such licensee of not less than \$10.00 nor more than \$100.00 for such violation, and for the second or third offense a revocation of such license. The section contemplates the granting of the license, though a sale thereunder in the room may violate it, or it would not provide for its revocation as a part of the penalty for such violation.

It must be conceded that at least a part of the things forbidden by the section, for instance, that, "no blinds, screens, or obstructions to the view of said room shall be arranged, erected, or placed so as to prevent the entire view from the street," etc., relate to acts to be done or suffered after the issue of the license. And even though the license issue, and such obstructions to the view are erected, and no sale takes place in such room under such license, there is no violation of the section, it has been held. *Hipes v. State*, 18 Ind. App. 426.

If, therefore, the things forbidden in the section relate to acts and things that may transpire after the grant of the license, it would be unreasonable to suppose that a trial of such questions was intended to precede the granting of the license. It is true, some of the things forbidden in the section may not relate to future acts and occurrences, but the provisions of the section make no distinction between existing matters and those which occur in the future.

To maintain their position, appellants' learned counsel refer us to the first section, but it seems to us that that section is against their contention, and not for it. The part of it cited reads thus: "That hereafter all persons applying for a license before any board of county commissioners, under the exist-

Gates et al. v. Haw et al.

ing laws of the State of Indiana, to sell spirituous, vinous, malt or other intoxicating liquors, shall, in such application, specifically describe the room in which he desires to sell such liquors, and the exact location of the same, and if there is more than one room in the building in which such liquors are intended to be sold, said applicant shall specifically describe and locate the room in which he desires to sell such liquors in such building." While it is true that to "specifically describe the room" and "the exact location of the same," as provided in section 1, it would be necessary to state that it was "situated upon the ground floor or basement of the building * * * and in a room fronting the street or highway upon which such building is situated" and to prove these allegations before the board can grant a license, yet it seems to us that it is no part of a specific description of a room to state whether the whole of the interior thereof can be seen from the street in front of it. Every piece of timber, every piece of iron, every pane of glass, and everything about a room, every door, every window, and every opening in a room, together with its size, length, depth and breadth and its exact situation as to street and ground floor or basement can be specifically described without stating whether the whole or any part of the interior of the room can be seen from the street in front of it. Just as a tract, lot, or parcel of land can be specifically described without stating whether from any given standpoint one can see all over it, and into the hollows or low places in or on it.

If the application is not required to set forth such a description as shows that the interior of the room can be seen from the street in front of it, as we think it is not, it is difficult to see how that question can arise on application for a license. It is claimed by

appellants that it was raised by their remonstrance on that ground. But that the interior of the room cannot be seen from the street in front has not been made a ground for remonstrance. The remonstrance authorized by the act we have quoted from cannot be based on any ground. The effectiveness of the remonstrance under it is made to depend upon the question whether the majority of the voters authorized to remonstrate have joined in the remonstrance. If they have, the license is defeated; otherwise, not. The only other law authorizing a remonstrance in such cases is the liquor law of 1875. Section 7278, Burns' R. S. 1894 (5314, R. S. 1881). That section provides that "it shall be the privilege of any voter of said township to remonstrate, in writing, against the granting of such license to any applicant, on account of immorality or other unfitness."

The fact that the interior of the room could not be seen from the street in front of it has nothing whatever to do with the question of the applicant's morality or immorality, fitness or unfitness. It has been frequently held that remonstrances under this section must proceed according to its provisions, and not otherwise. *Fletcher v. Crist*, 139 Ind. 121, and cases there cited; *Head v. Doehleman*, 148 Ind. 145, and cases there cited. A remonstrance under it can only be based on the immorality or other unfitness of the applicant.

Certainly, it would be extremely unreasonable to suppose that the legislature intended that the situation and arrangement of the room, so far as a view of the interior thereof from the street is concerned, should be investigated before the board of commissioners on an application for a license, unless its determination thereof should be final and conclusive on that question if unappealed from. And yet how absurd it would

Baum *et al.* v. Thoms.

be to say that in case the licensee should be indicted for a violation of said section 4 as to the view into the interior of the room, that he could set up the decision and judgment of the board of commissioners thereon as conclusive in his favor. The fact that no way is provided by which that question can be tried before the board, and a way is provided for trying it on indictment, is strong evidence that the legislative intent was not to try that question until a licensee is indicted for violating said section four.

It follows that the finding was not contrary to law, and hence there was no error in overruling appellants' motion for a new trial. Judgment affirmed.

BAUM ET AL. v. THOMS.

[No. 18,544. Filed April 27, 1898.]

180	378
168	581
168	582

USURY.—*Complaint to Cancel Mortgage.*—*Sufficiency.*—A complaint to set aside a mortgage which alleges that defendants were loaning money at usurious interest; that they had separate places of business, but a mutual understanding and arrangement between themselves by which the loans were changed from one to the other in order the more successfully to carry on the business of loaning money at illegal and usurious interest; that plaintiff borrowed \$25.00 in 1891, and \$50.00 in 1892, under an agreement that she was only to pay interest at the legal rate, and that she paid thereon, principal and interest, \$175.00, when in 1894 they claimed that there was yet due \$150.00; that she finally executed the mortgage and note for \$112.60, on account of the threats, importunities, and oppressive conduct of the parties, set forth in the complaint, states facts sufficient to withstand a demurrer. *p. 380.*

SAME.—*Recovery of Usurious Interest Voluntarily Paid.*—*Common Law Action.*—*Assumpsit.*—A borrower who has paid more than the legal rate of interest is not confined to the remedy given by statute, but may maintain assumpsit at common law to recover back the excess of interest paid, on paying or offering to pay the money lent with lawful interest. *pp. 382-387.*

STATUTORY CONSTRUCTION.—*Repeal of Statute.*—*Repeal of Repealing Act.*—*Common Law Rule.*—Where a statute or rule of the common law is repealed or modified, and the repealing or modifying act is afterwards expressly or impliedly repealed by an act which mani-

Baum *et al.* v. Thoms.

feels no intention that the statute or common law rule repealed or modified shall continue repealed, the common law rule is that the repeal of the repealing or modifying act revives the act or common law rule so repealed or modified. *p. 386.*

STATUTORY CONSTRUCTION.—*Repeal of Repealing Act.—Common Law Rule Changed.*—The common law rule in regard to the effect of the repeal of a repealing act has been changed, so far as the same applies to acts of the legislature, by section 248, Burns' R. S. 1894 (248, Horner's R. S. 1897), but the rule as to the repeal of an act repealing or modifying a rule of the common law remains unchanged, and the repeal of the act repealing or modifying the common law rule revives the rule *ab initio*, and it exists the same as if it had never been repealed. *pp. 386, 387.*

USURY.—*Voluntary Payment of Usurious Interest.*—The payment of usurious interest is not a voluntary payment in such sense as to entitle the receiver to retain the amount paid above the legal interest, but such payment is regarded as under the constraint of a formal, though illegal, contract, obtained by taking advantage of the necessities of the borrower, and, therefore, excepted from the ordinary rule that one voluntarily paying money on an illegal claim cannot maintain an action to recover such payment. *p. 388.*

PRACTICE.—*Motion to Modify Judgment.—Must Be Good as a Whole.*—Motions to modify judgments or interlocutory orders, or motions to strike out evidence, pleadings, judgments, or interlocutory orders must be good as a whole. *pp. 389, 390.*

From the Marion Superior Court. *Affirmed.*

John W. Keeling and Charles Averill, for appellants.
Hez. Dailey, H. M. Wyatt, G. R. Estabrook and G. W. Spahr, for appellee.

MONKS, J.—Appellee brought this action against appellants to set aside and cancel a note and mortgage executed by her, and to recover usurious interest paid to appellants.

The court tried said cause, and made a general finding in favor of appellee, and, over the separate motion of each appellant for a new trial, judgment was rendered in favor of appellee. Appellants filed separate motions to modify the judgment which were overruled.

The errors assigned call in question the sufficiency

Baum et al. v. Thoma.

of the complaint, the action of the court in overruling the motions for a new trial, and in overruling the motions to modify the judgment.

The complaint charges, in substance, that the defendants in the court below were engaged in the business of loaning money at usurious interest, and that, while they had separate places of business, they had an understanding and arrangement between themselves by which the loans were changed from one to the other in order the more successfully to carry on the business of loaning money at illegal and usurious interest; that appellee borrowed \$25.00 in 1891, and \$50.00 in 1892, under agreement that she was only to pay interest at the legal rate, and that she paid thereon, principal and interest, \$175.00, when in 1894 they claimed that there was yet due \$150.00,—when in fact the sum loaned had been fully paid, principal and legal interest, and she had paid them in addition thereto \$50.00 usurious interest on said loan; that she finally executed the mortgage and note for \$112.60, set out in the complaint, on account of the threats, importunities, and oppressive conduct of the parties, which are set forth in the complaint at great length. It is evident that said complaint was sufficient to withstand a demurrer for want of facts.

The causes assigned for a new trial are: (1) That the decision of the court was not sustained by sufficient evidence; (2) that the decision of the court is contrary to law; (3) that the damages assessed are excessive; (4) error in the assessment of the amount of recovery, the same being too large.

It is insisted by appellant Mackey, to whom the note and chattel mortgage in controversy were executed, that the evidence shows that he loaned \$105.10 to appellee and took said note and chattel mortgage for \$112.50, and that said appellee borrowed the same to

Baum et al. v. Thoms.

pay what she owed appellant Baum, and that, when said note and mortgage were executed, a check for \$105.10 was delivered to appellee, and that she, at the time, wrote her name across the back of said check, and the same was taken away by appellant Baum, whose claim the \$105.10 was borrowed to pay, and that, therefore, the finding was not sustained by the evidence.

There was evidence to the effect claimed, but the court may have concluded from all the evidence that appellants were acting in concert, and that the check was given in order to cover up the real transaction, which was to procure the note and mortgage for an indebtedness which was already more than paid, and at the same time give it the appearance of a new loan, and thus cut off the defense of usury. To support such conclusion it was not necessary that any one should testify that such was the purpose of the transaction, or that there was an agreement or understanding between appellants to that effect, or that the money received on said check was returned by Baum to Mackey after the note and mortgage were executed. Such facts may be established by circumstantial evidence. The trial court heard the witnesses testify, saw their manner and conduct while testifying, and was the exclusive judge of their credibility, and was able to determine whether said affair in giving the note and mortgage to appellant Mackey, and the delivery of the check to appellee, and the indorsement by her of the same to Baum, was what it appeared to be, a new loan to appellee, or whether it was a mere form, a sham arranged to deceive and mislead appellee, and cover up the real transaction.

It is next insisted that while usurious interest voluntarily paid may, under section 7046, Burns' R. S. 1894 (5201, Horner's R. S. 1897), be recouped by the

Baum et al. v. Thoms.

debtor in an action on the contract affected by such usury, the same cannot be recovered back in a direct action, and that, therefore, the finding and judgment against appellants for usurious interest paid by appellee was contrary to law.

Whatever the rule may be in other states it has been uniformly held in this jurisdiction that usurious interest could at common law be recovered back in an action brought for that purpose. *Lacy v. Brown*, 67 Ind. 478, and cases cited. *Musselman v. McElhenny*, 23 Ind. 4, 6, 85 Am. Dec. 445; *Wood v. Kennedy*, 19 Ind. 68; *Smead v. Green*, 5 Ind. 308, 309; *Berry v. Makepeace*, 3 Ind. 154; *State Bank v. Ensminger*, 7 Blackf. 105, 107, and cases cited. See note to *Crawford v. Harvey*, 1 Blackf. (2d ed.), p. 382. See, also, *Palmer v. Lord*, 6 Johns Ch. 95, 100-106; *Wheaton v. Hibbard*, 20 Johns 290, 292, 293, 11 Am. Dec. 284; *Nichols v. Bellows*, 22 Vt. 581, 54 Am. Dec. 85, and note; *Bexar, etc., Association v. Robinson*, 78 Tex. 163, 22 Am. St. 36, and note p. 41; *Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395, and note pp. 400-402; 27 Am. and Eng. Ency. of Law, 959, and cases cited in notes 3 and 4.

The rule is that the borrower who has paid more than the legal rate of interest is not confined to the remedy given by statute, but may maintain assumpsit at common law to recover back the excess of interest paid, on paying or offering to pay the money lent with lawful interest. *Berry v. Makepeace*, *supra*; *Palmer v. Lord*, *supra*; *Wheaton v. Hibbard*, *supra*.

The R. S. 1843, p. 580, sections 25, 26, fixed the legal rate of interest per annum, and section 29, p. 581, provided that "No contract or assurance for the payment of money with interest, or upon which interest has been received, contracted for, taken, or reserved, after a greater rate than is allowed by the preceding sections of this article, shall be thereby rendered void;

Baum et al. v. Thoms.

but whenever in any action brought on such contract or assurance, it shall appear upon a special plea to that effect, or otherwise, that a greater rate of interest has been directly or indirectly reserved, contracted for, taken, or received, than is allowed by law, the defendant shall recover his full costs in such suit, and the plaintiff shall only recover judgment for the principal sum due him without interest thereon; or if he shall have taken or received such interest, or any part thereof, before the rendition of such judgment, the same shall be deducted from such principal sum, and the judgment shall be rendered for the balance as above."

It was provided in section 30, p. 581, that "Any person who shall have paid a greater amount of interest or value than is above allowed, or his personal representatives may recover against the person or the corporation who shall have taken the same, or against the personal representative of such person, the whole amount of interest or value which he may have paid, if such action be brought within a year after the payment of the same."

In *Berry v. Makepeace*, *supra*, the appellant sued appellee to recover usurious interest paid in excess of six per cent. per annum, the legal rate fixed by the R. S. 1843. Appellee, upon the theory that the action was brought under section 30, p. 581, R. S. 1843, to recover the whole amount of interest paid, filed a plea which in effect alleged that the action was not brought within a year after the payment of such usurious interest. This court held that the action was not brought under said section 30 of the statute to recover the whole amount of interest paid, but was to recover the interest paid in excess of the legal rate, and that such action could be maintained at common law independently of the statute. The court said,

Baum et al. v. Thoms.

"The plea might have been applicable if the action had been brought under the statutory provision (R. S., c. 31, s. 30, p. 581), to recover the whole of the interest paid as illegal, but such is not the case. The suit is for the excess of interest paid, which may be recovered back in this form of action, by the common law, and independently of the statute of the state. *State Bank v. Ensminger*, 7 Blackf. 105."

This rule of the common law that usurious interest could be recovered back, was modified by statute in 1865, when the legislature passed an act (Acts Sp. Sess. 1865, p. 176, 3 Davis' R. S. 1876, p. 316, 1 Davis' R. S. 1876, p. 600), amending sections five and six of the act of 1861, regulating interest on money. Acts 1861, p. 138, 2 Gavin & Hord, pp. 656, 657. The last clause of said section five, as amended, provided "that in all cases in which money or any thing of value shall have been voluntarily paid as interest for the loan, use or usance of money the same shall not be recovered back, either directly or by way of set-off or counterclaim or payment." While this section as amended was in force, usurious interest voluntarily paid could not be recovered back in a direct action for that purpose, nor could the debtor in any action against him by the party receiving such usurious interest recover the same back by way of set-off, counterclaim or payment. *Bowen v. Phillips, Admr.*, 64 Ind. 226, 235, 236.

In *Musselman v. McElhenny*, *supra*, decided at the November term 1864, under the interest law of 1861, and before the amendment of section 5 in 1865, this court, at p. 6, said, "If usurious interest is paid on the note after its execution, it amounts to a payment of so much on the principal of the note; and if the amount thus paid exceeds the principal, it may be recovered back."

In 1867 the legislature passed an act entitled "An act concerning interest on money, and to provide for the recoupment of usurious interest," section two of which act contained the following provision: "All interest exceeding the rate of ten per centum per annum shall be deemed usurious and illegal, as to the excess only, and in any action upon a contract affected by such usury, such excess may be recouped by the defendant, whenever it has been reserved or paid before the bringing of the suit." Acts 1867, p. 151, 3 Davis' R. S. 1876, p. 317, 1 Davis' R. S. 1876, p. 599. Said act of 1867 contained no repealing clause, but it repealed by implication so much of the amended section 5, *supra*, passed in 1865, as prohibited the recoupment of usurious interest in an action brought upon the contract affected by such usury, but the prohibition in said amended section 5 against the recovery of usurious interest voluntarily paid, in a direct action or by way of set-off, or recoupment, in any action brought by the party receiving such usurious interest upon any contract other than the one affected by such usury, was not repealed in any manner by the act of 1867, but remained in force as a part of the law of this State. *Holcraft v. Mellott*, 57 Ind. 539, 543, 544.

Under said act of 1867, in an action on the contract affected by usury, if the excess of the interest voluntarily paid by the debtor over ten per centum per annum, amounted to more than the balance due on the note sued upon, he could only recoup to the extent of such balance due on the note, and on account of the unrepealed prohibition contained in said amended section five, *supra*, could not recover a judgment for the excess of such usurious interest over the amount due on said note. *Holcraft v. Mellott*, *supra*, p. 544.

Baum *et al.* v. Thoms.

In 1879 the legislature passed "An act concerning interest and usury" (Acts 1879, p. 43, 44, sections 7043-7050, Burns' R. S. 1894, 5198-5205, Horner's R. S. 1897), the last section of which repealed in express terms all acts on the subject of interest. The amended section five, *supra* (Acts Sp. Sess. 1865, p. 176, 3 Davis' R. S. 1876, p. 316, 1 Davis' R. S. 1876, p. 600), which prohibits the recovery of usurious interest voluntarily paid, was therefore repealed by section 7050, Burns' R. S. 1894 (5205, Horner's R. S. 1897).

Where a statute or rule of the common law is repealed or modified, and the repealing or modifying act is afterwards expressly or impliedly repealed by an act which manifests no intention that the statute or common law rule repealed or modified shall continue repealed, the common law rule is that the repeal of the repealing or modifying act revives the act or common law rule so repealed or modified. *Doe v. Naylor*, 2 Blackf. 32; *Lindsay v. Lindsay*, 47 Ind. 283, and cases cited; *Teter v. Clayton*, 71 Ind. 237; *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281; *State v. Rollins*, 8 N. H. 550; *Gray v. Obear*, 54 Ga. 231; *Den v. DuBois*, 16 N. J. L. 285; *Hastings v. Aiken*, 1 Gray (Mass.) 163; 23 Am. and Eng. Ency. of Law 517; Bishop on Stat. Crimes, section 186; Endlich on Interp. of Stat., section 475.

The common law rule in regard to the effect of the repeal of a repealing act has been changed so far as the same applies to acts of the legislature, by section 248, Burns' R. S. 1894 (248, Horner's R. S. 1897), which was enacted in 1877 (Acts 1877, p. 73). *Teter v. Clayton*, *supra*. Whether said section 248, *supra*, changes the rule as to the effect of the repeal of an act modifying a former act of the legislature we need not determine. See, however, *Bank of Savings v. Collector*, 3 Wall. 495; *Smith v. Hoyt*, 14 Wis. 272; 23 Am. and Eng. Ency. of

Law 519, and note 2; Endlich on Interp. of Stat., section 476.

The rule, however, in regard to the repeal of an act repealing or modifying a rule of the common law remains unchanged, and the repeal of the act repealing or modifying the common rule revives the common rule *ab initio*, and it exists the same as if it had never been repealed. The time during which statutes repealing the common law rule remain in force is regarded only as a suspension of such rule of the common law. *Winter v. Dickerson*, 42 Ala. 92; *Johnson v. Mecker*, 1 Wis. 436; *Commonwealth v. Getchell*, 16 Pick. (Mass.) 452; Endlich on Interp. of Stat., section 475.

Said act of 1879 took effect May 31, 1879, since which time the common law rule in regard to the recovery of usurious interest, as declared in *State Bank v. Ensminger*, *supra*, and the cases following it, has been in force in this State the same as it was before the taking effect of the amended section five, *supra*, in 1865.

It is true that section 4 of the act of 1879, being section 7046, Burns' R. S. 1894 (5201, Horner's R. S. 1897), provides that "When a greater rate of interest than is hereby allowed [eight per cent.] shall be contracted for, the contract shall be void as to the usurious interest contracted for; and in an action on such contract, if it appear that interest at a higher rate than eight per cent. has been directly or indirectly contracted for, the excess of interest over six per cent. shall be deemed usurious and illegal, and in an action on a contract affected by such usury, the excess over the legal interest may be recouped by the debtor, whenever it has been reserved or paid before the bringing of the suit." But as we have shown, the borrower is not confined to the remedy given by statute, but may resort to the remedy given by the com-

Baum et al. v. Thoms.

mon law. *State Bank v. Ensminger, supra; Smead v. Green, supra; Lacy v. Brown, supra; Palmer v. Lord, supra; Wheaton v. Hibbard, supra.*

The payment of usurious interest is not a voluntary payment in such sense as to entitle the receiver to retain the amount paid above legal interest, but such payment is regarded as under the constraint of a formal, though illegal, contract, obtained by taking advantage of the necessities of the borrower, and therefore excepted from the ordinary rule that one voluntarily paying money on an illegal claim cannot maintain an action to recover such payment. *Wheaton v. Hibbard, supra; Schroepfel v. Corning*, 5 Denio 236; *Peterborough Savings Bank v. Hodgdon*, 62 N. H. 300; *Willie v. Green*, 2 N. H. 333; *Caughman v. Drafts*, 1 Rich. Eq. 414; *Fay v. Lovejoy*, 20 Wis. 403; *Wood v. Lath*, 13 Wis. 84; *First National Bank of Milwaukee v. Plankinton*, 27 Wis. 177, 9 Am. Rep. 453; *Grow v. Albee*, 19 Vt. 540; *Williams v. Wilder*, 37 Vt. 613; *Scott v. Leary*, 34 Md. 389; *Philanthropic Building Assn. v. McKnight*, 35 Pa. St. 470; *Thomas v. Shoemaker*, 6 W. & S. (Pa.) 179-183. Note to *Ziegler v. Scott*, 54 Am. Dec. 400-402. Note to *Bexar, etc., Association v. Robinson*, 22 Am. St. 41. Note to *Davis v. Garr*, 55 Am. Dec. 398-400; 2 Ency. Plead. and Prac., pp. 1019, 1020, and note on usury.

It follows, therefore, that in the absence of a statute expressly prohibiting it, usurious interest, which has been paid by a debtor may be recovered in a direct action, or in any action brought by the person receiving such usurious interest, on a contract express or implied against such debtor. Since the repeal of the amending act of 1865, *supra*, by the act of 1879, *supra*, there has been no statute in this State prohibiting the recovery of usurious interest paid by a debtor.

It is clear from what we have said and the authori-

Baum et al. v. Thoms.

ties cited, that in this State, since the taking effect of the interest law of 1879, a borrower who has paid usurious interest may recover the same in a direct action brought for that purpose, or if the person receiving the usurious interest, sues him upon the contract affected by such usury, or upon any other contract for the payment of money, he may recover the same by way of set-off, recoupment, payment, or counterclaim, as the facts of the case may permit, the same as could have been done before the passage of the amendatory act of 1865.

It is next insisted that the court erred in overruling the separate motions of appellants to modify the finding and judgment of the court. The court made a general finding in favor of appellee, and the amount she was entitled to recover, and that the same was "collectible without the benefit of exemption laws." Judgment was rendered for the amount of the finding, and also provided that the same was "collectible without the benefit of exemption laws."

Appellants made separate motions to modify the general finding and judgment by striking out of the finding and out of the judgment the amount of the recovery, and the words "collectible without the benefit of exemption laws." It is insisted by appellants that the amount of the recovery stated in the finding and judgment should have been stricken out because the amount is for usurious interest paid, and the same cannot be recovered in a direct action, but can only be recouped in an action on the contract affected by the usury, and that the words "collectible without the benefit of exemption laws" should have been stricken out because "the finding proceeds upon the theory that appellee was entitled to recover for usurious interest paid, which is not a tort." Each of said motions was overruled as a whole, to which ruling of the court appellants each excepted.

Bealer v. The State.

As we have already held that appellee had the right to recover in a direct action usurious interest paid, it would have been error for the court to have sustained a motion to strike out the amount of recovery in the finding and judgment. The court did not err, therefore, in overruling each of said motions as a whole, even if it would have been error to have overruled motions to modify the judgment by striking out the words "collectible without the benefit of exemption laws" and asking no other relief. Whether such a motion should have been sustained, if made, we need not, and do not, decide. The rule is that it is not error to overrule motions to modify judgments or interlocutory orders or motions to strike out evidence, pleadings, judgments, or interlocutory orders, where they are not well taken as a whole. *Spencer v. Board, etc.*, 117 Ind. 573, 584; *Heberd v. Wines*, 105 Ind. 237, 239, 240; *Mathews v. Droud*, 114 Ind. 268, 271, 272; *Pape v. Wright*, 116 Ind. 502, 508-509, and cases cited; *Waymire v. Lank*, 121 Ind. 1; *Snideman v. Snideman*, 118 Ind. 162, 164; *Binford v. Young*, 115 Ind. 174, 176, and cases cited; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409, 416; *Carver v. Louthain*, 38 Ind. 530, 541; *Western Union Tel. Co. v. State*, 147 Ind. 274, 277. Finding no available error in the record, the judgment is affirmed.

BEALER v. THE STATE.

[No. 18,558. Filed April 28, 1896.]

INSTRUCTIONS.—*Criminal Law.—Appeal.*—In criminal cases instructions cannot be brought into the record except by bill of exception. p. 392.

SAME.—*Appeal.—Presumption.*—In the absence of a showing by the record to the contrary, it will be presumed on appeal that the trial court properly instructed the jury. p. 393.

CRIMINAL LAW.—*Larceny.—Verdict.—Indeterminate Sentence Law.*—

150	390
150	701
151	514

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153	690

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154	107
155	647

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164	209

150	390
170	131

Bealer v. The State.

On a prosecution for larceny the jury returned the following verdict: "We the jury find the defendant guilty as charged in the indictment; and we further find that he is thirty-two years of age." *Held*, that the verdict was not defective in not fixing the punishment, as the case came within the provisions of the indeterminate sentence law. p. 394.

From the Morgan Circuit Court. *Affirmed*.

J. V. Mitchell and *D. E. Watson*, for appellant.

William A. Ketcham, Attorney-General, for State.

MCCABE, J.—Appellant was convicted on an indictment charging him with receiving stolen property, knowing the same to have been stolen, namely, two hens, alleged to be of the value of one dollar, and sentenced to the State prison for not less than one nor more than three years, and fined one dollar. The errors assigned, and not waived, call in question the action of the circuit court in overruling appellant's motion for a new trial, for a *venire de novo*, and in arrest of judgment.

Under the motion for a new trial, the giving and refusing of certain instructions to the jury are complained of; and, as was said in *State v. Hunt*, 137 Ind. 551: "None of the instructions are embodied in a bill of exceptions. They are copied into the transcript with no other authentication of them as parts of the record below than a statement on the margin of each, to wit: 'Given, and excepted to by the State [defendant here] October 17th, 1893 [here, this 19th day of Nov. 1897],' " signed by the attorney for the party, and the judge. "It has been held that instructions in criminal cases cannot be incorporated in the record in that way, though they may be so incorporated in a civil case, and that in a criminal case they can only be brought into the record by a bill of exceptions." To the same effect are *Chandler v. State*, 141 Ind. 109; *Reynolds v. State*, 147 Ind. 12; *Reinhold v.*

Bealer v. The State.

State, 130 Ind. 472; *Brown v. State*, 111 Ind. 442; *Hollingsworth v. State*, 111 Ind. 296; *Meredith v. State*, 122 Ind. 514; *Delhaney v. State*, 115 Ind. 499; *Leverich v. State*, 105 Ind. 277.

The punishment for the offense of which appellant was convicted, as provided in the statute defining it, is the same as that prescribed by the statute for grand larceny; but if the goods are worth less than \$25.00, as was the case here, the punishment is the same as that prescribed for petit larceny. Section 2012, Burns' R. S. 1894 (1935, R. S. 1881). The punishment prescribed for petit larceny is imprisonment in the State prison not more than three years, nor less than one year, a fine in any sum not exceeding \$500.00, and disfranchisement and incapacity to hold any office of trust or profit for any determinate period, or imprisonment in the county jail not more than one year, and a fine not exceeding \$500.00, and disfranchisement and incapacity to hold any office of trust or profit for any determinate period.

This prosecution is subject to the indeterminate sentence law, if the case falls within its provisions, because the offense is charged to have been committed on February 2, 1897, after that law took effect. But the offense charged is one that may fall within the provisions of that act, or may not, depending on the determination of the question by the jury or the court trying the cause as to the measure of punishment deserved by the defendant. If, under all the circumstances disclosed by the evidence, either of aggravation or mitigation, the jury or court trying the case should deem a jail sentence, and the other incidental punishment provided in case of such jail sentence, as severe as the defendant deserves, then the finding or verdict, as we have held, should be returned precisely as if the indeterminate sentence law had not been

Bealer v. The State.

passed, because in that event the case would not fall within either that law or the reformatory act. *Hicks v. State*, ante, 293. And, on the contrary, if, in all that class of felonies where there may be a jail sentence, and its incidents, instead of imprisonment in a State prison, in the discretion of the court or jury trying the case, such jail sentence, and its incidents, are not deemed severe enough for the defendant's offense, by the court or jury trying the case, then the case falls within the provisions of the indeterminate sentence law, or the reformatory act, according to the age of the defendant, he being a male person. *Hicks v. State*, supra. It was held in that case that it was the duty of the trial court to properly instruct the jury, in such a case, if a jail sentence, together with its incidents, was as severe punishment as the defendant's offense deserved, they should return their verdict precisely as if the indeterminate sentence law or the reformatory act had never been passed, and if such jail sentence, with its incidents, was not as severe a punishment as the defendant, under all the circumstances, deserved, that their verdict should be framed in accordance with whichever of those acts applied to the case.

In the absence of a showing by the record to the contrary, as is the case here, the law requires us to presume that the court did so correctly instruct the jury in this case; and, having been so correctly instructed, they returned a verdict reading thus: "We, the jury find the defendant guilty as charged in the indictment; and we further find that he is 32 years of age." Presuming, as we must, that the jury were properly instructed, this verdict makes the case fall within the indeterminate sentence law. And the circuit court accordingly rendered judgment thereon for a fine of one dollar, and imprisonment in the State

 Boyd v. Radabaugh et al.

prison for not less than one nor more than three years, and disfranchised and rendered the defendant incapable of holding any office of trust or profit for one year, and for costs.

The motions for a *venire de novo* and in arrest of judgment were on the ground that the verdict was defective in not fixing the punishment, and the motion for a new trial was on the ground, among others, that the verdict was contrary to law. The objection mentioned to the verdict is the only one urged under all three of these motions. Such a verdict is expressly authorized, as we have recently held, under both of the acts mentioned; and we have affirmed the validity of both of said acts. *Miller v. State*, 149 Ind. 607. There appearing in the record no error, the judgment must be, and is, affirmed.

Jordan, J., took no part in this decision.

 BOYD v. RADABAUGH ET AL.

[No. 18,413. Filed April 20, 1898.]

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153	392
150	394
154	390

MARRIED WOMEN.—Suretyship.—Answer.—In an action against a husband and wife to foreclose a mortgage on the wife's separate property, an answer by the wife that the note and mortgage sued on were executed "to secure the debts of her husband, and for no other purpose or consideration, and that she did not receive any of the consideration of said note, nor was the same or any part of it paid to her or used for her benefit or the improvement of her separate property" is a sufficient answer of suretyship. pp. 395, 396.

SAME.—Suretyship.—Evidence.—In an action against a husband and wife to foreclose a mortgage on the wife's separate property, the evidence showed that the note and mortgage were executed for money borrowed by the husband to pay his own debts, which fact was known to the mortgagee; but that the money was paid to the wife by check. *Held*, that the evidence was sufficient to sustain the finding that the wife executed the note and mortgage as surety. pp. 396, 397.

APPEAL.—Weight of Evidence.—In determining on appeal whether the evidence sustains the findings or verdict, only the evidence sustaining the trial court will be considered. pp. 397, 398.

Boyd v. Radabaugh et al.

From the Jay Circuit Court. *Affirmed.*

John W. Headington and John F. LaFollette, for appellant.

J. H. Sell, J. J. M. LaFollette and O. H. Adair, for appellees.

MONKS, J.—This action was brought against appellees to foreclose a mortgage executed by appellee, Dora B. Radabaugh, and Homer C. Radabaugh, her husband. Final judgment was rendered against appellant.

The only errors assigned are: (1) The court erred in overruling appellant's demurrer to the second paragraph of the separate answer of appellee Dora B. Radabaugh. (2) The court erred in overruling appellant's motion for a new trial.

Appellant insists that the second paragraph of the separate answer of the appellee Radabaugh was not sufficient because it was not alleged therein that she was surety for her husband, or for any other person, or that the contract was to answer for the debt of another. It is averred in said paragraph that said appellee, at the time she executed said note and mortgage, was the wife of her codefendant, Homer C. Radabaugh, and that the same were given "to secure the debts of her said husband, and for no other purpose or consideration, and that she did not receive any of the consideration of said note, nor was the same or any part of it paid to her or used for her benefit or the improvement of her separate property; that all the consideration of said note and mortgage was used and paid out to liquidate debts of her said husband, which had been contracted and were due long before the note and mortgage sued on were executed." This paragraph alleges that said note and mortgage were executed by her to secure the debt of her husband, and was there-

Boyd v. Radabaugh et al.

fore a sufficient answer of suretyship, under the law as declared in the following cases: *Allen v. Davis*, 99 Ind. 216; *Vogel v. Leichner*, 102 Ind. 55; *Warey v. Forst*, 102 Ind. 205; *Allen v. Davis*, 101 Ind. 187; *Brown v. Will*, 103 Ind. 71; *Cupp v. Campbell*, 103 Ind. 213; *Engler v. Acker*, 106 Ind. 223; *Crooks v. Kennett*, 111 Ind. 347; *Merchants, etc., Assn. v. Scanlan*, 144 Ind. 11; *Cole v. Temple*, 142 Ind. 498; *Leschen v. Guy*, 149 Ind. 17.

Appellant insists that the court erred in overruling her motion for a new trial. The reasons assigned for a new trial in said motion are that the finding was contrary to law and not sustained by the evidence. The note secured by the mortgage called for \$131.78, and was payable to Truman O. Boyd and Granville Phillips, who assigned the note and mortgage to Lewis Grisell, November 10, 1894, the day after the same were executed, and he assigned the same to appellant, the wife of said Truman O. Boyd, December 17, 1894.

The evidence given on behalf of appellee shows that Homer C. Radabaugh owed the Singer Sewing Machine Company \$45.00, and borrowed the money of Truman O. Boyd to pay it; that he told him what he wanted the money for, and that he and his wife would give him a mortgage to secure the same. Prior to this time Radabaugh had been under treatment for the habit of intoxication, and \$40.00 had been borrowed to pay a part of the expense of that treatment, for which Granville Phillips had become security, and which he, Phillips, had paid Mrs. Radabaugh, and her husband had given a mortgage to Phillips to secure this amount. Said Radabaugh also owed one Grisell some borrowed money which Boyd had for collection, and these three items made up the amount of \$131.78, for which the note in suit was given.

Rodgers v. The Baltimore and Ohio Southwestern R. W. Co.

When the note and mortgage were executed, Boyd, instead of paying over the \$45.00 loaned by him, gave a check for the amount, payable to Mrs. Radabaugh. The money so borrowed was used to pay the indebtedness of said Homer C. Radabaugh, and no part thereof was used for the improvement or betterment of the separate property of his wife. Said Dora B. Radabaugh was, when the mortgage was executed and until the trial, the wife of her codefendant Homer C. Radabaugh, and at the time of the execution of said mortgage said real estate was, and at all times since has been, the separate property of said Dora B. These facts are clearly sufficient to sustain the finding of the court. The fact that the check was made payable to the wife can make no difference, the money was borrowed by the husband to pay his own debts, and he so informed Truman O. Boyd at the time, and the money so borrowed of Boyd was used for that purpose; and Boyd could not by making the check for \$45.00 or \$48.00 payable to Mrs. Radabaugh, change the legal effect of the transaction or make her a principal, when under the law as declared by this court she was only a surety. The other items that went into the note for \$131.78 were outstanding liabilities of the husband. It is true there was evidence given to the contrary on behalf of the appellant, but in determining the question presented we can only consider the evidence sustaining the action of the court. *Lawrence v. Van Buskirk*, 140 Ind. 481. Judgment affirmed.

RODGERS v. THE BALTIMORE AND OHIO SOUTHWESTERN RAILWAY COMPANY.

[No. 18,269. Filed Feb. 23, 1898. Rehearing denied May 10, 1898.]

RAILROADS.—*Blowing Whistle*.—*Damages*.—*Complaint*.—A complaint against a railroad company for damages for personal injuries

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150	199
150	397
158	852
150	397
167	209
167	340
167	341

Rodgers v. The Baltimore and Ohio Southwestern R. W. Co.

which alleges in general terms that defendant carelessly, negligently, recklessly, and without any necessity whatever, caused the whistle of its locomotive to be blown, thereby frightening plaintiff's team, causing it to run away, and resulting in the injuries of which he complains, without any fault on the part of plaintiff, states a cause of action as against a demurrer for want of facts. *pp. 398-403.*

RAILROADS.—Blowing Whistle.—Not Negligence Per Se.—The mere sounding of a locomotive whistle, even at a place of extraordinary danger, is not negligence *per se*, but a railroad company is liable for its negligence in blowing a locomotive whistle from which horses are frightened and caused to do injury. *pp. 401, 402.*

PLEADING.—Demurrer.—A demurrer does not raise the question of the sufficiency of a complaint where such defect could properly be reached by a motion to make the allegations of the complaint more specific. *p. 403.*

From the Clark Circuit Court. *Reversed.*

Jonas G. Howard, for appellant.

Charles L. Jewett, Henry E. Jewett, Judson Harmon and E. N. Strong, for appellee.

HACKNEY, J.—This was an action by the appellant for damages resulting in his personal injury, and from the negligence of the appellee.

The lower court sustained the appellee's demurrer to the complaint, and that ruling alone is assigned as error. It was alleged that the Louisville and Jeffersonville Bridge Company had just completed its bridge across the Ohio river, between the cities of Louisville and Jeffersonville, together with the approaches or viaducts leading to such bridge; that said bridge had not been opened to the regular public traffic, and notice had been given that it would not be so opened until the first of September, of which fact appellant had knowledge; that on the 18th day of August a construction train, heavily laden, had made two or three trips across said bridge, the first train which had ever crossed the same; that on the 19th day of August, at a time when the appellant, who was a teamster, was driving his team along Market street,

Rodgers v. The Baltimore and Ohio Southwestern R. W. Co.

in the city of Jeffersonville, at or near the intersection of said street and the viaduct, at the north end of said bridge, and when he was about to pass under said viaduct, the appellee ran a locomotive and a passenger coach, at the speed of twenty miles an hour upon and over said viaduct, and from off said bridge to the said intersection of said Market street and the viaduct; that as said locomotive approached said intersection the appellee "carelessly, negligently, recklessly, and without any necessity whatever, caused the whistle of said locomotive to be blown," thereby frightening appellant's team, causing it to run away, and resulting in the injuries of which he complains.

It was further alleged that "said injuries * * * resulted solely from the negligent, careless, reckless, and unnecessary act of said defendant in blowing said whistle of said engine, and in having failed to notify the public that said train would cross said river, over said bridge, on said day, which were the sole and only causes of said injuries, and of said mules becoming frightened, and of their running away, and without any fault or negligence on behalf of said plaintiff."

It was alleged also that said intersection was in a populous part of said city, and was so obstructed by buildings and the viaduct that an approaching train from the south could not be seen by one approaching the intersection upon said Market street, and that he could not hear said locomotive and car until he reached the said intersection, and when they were so near the intersection that he could not avoid the meeting.

The complaint proceeds upon the theory of negligence, which is alleged to have consisted in the unnecessary act of blowing the whistle at the time and

Rodgers v. The Baltimore and Ohio Southwestern R. W. Co.

place. Counsel for the appellant expressly disclaims any other theory, or that the alleged negligence consisted in any other act or omission.

The sufficiency of the complaint is denied by the appellee upon the proposition that railway companies are not liable for injuries resulting from the frightening of horses occasioned by the noises necessarily incident to the proper operation of their lines.

This proposition is well supported by authority. *Louisville, etc., R. W. Co. v. Schmidt*, 134 Ind. 16; *Ohio, etc., R. W. Co. v. Trowbridge*, 126 Ind. 391; *Baltimore, etc., R. W. Co. v. Thomas*, 60 Ind. 107; *Peru, etc., R. R. Co. v. Hasket*, 10 Ind. 409, 71 Am. Dec. 335; *Lamb v. Old Colony R. R. Co.*, 140 Mass. 79 2 N. E. 932; *Norton v. Eastern R. R. Co.*, 113 Mass. 366; *Whitney v. Maine Central R. R. Co.*, 69 Me. 208; *Yingst v. Lebanon, etc., R. W. Co.*, 167 Pa. St. 438, 31 Atl. 687; *Heininger v. Great Northern R. W. Co.*, 59 Minn. 458, 61 N. W. 558; Rorer on Railroads 704. The application of this proposition will be considered further along.

The use of the steam whistle is necessary in rail-roading as a warning of approaching trains, both to enable those approaching the tracks to avoid collision, and to save travelers upon the trains from the results of collision, as well as to protect the company from the destruction of its property. Its use is not only sanctioned by the legislation of this State, but, as a signal of approach to highways, is required. Its use is often proper when possible injury may result, as if in the case before us, a person had been walking upon the viaduct ahead of the train, at some point north of the crossing of Market street, and had been discovered by the engineer as the train reached Market street, and it was apparently necessary to warn him of the approaching train. The possible frighten-

Rodgers v. The Baltimore and Ohio Southwestern R. W. Co.

ing of a horse properly in the vicinity, and the possible collision with the footman would present an instance where the signal could properly be made. The safety of the footman, of the train, and of those on board could not reasonably be hazarded for the chance of frightening a horse not known to be present. In such an instance the signal would certainly be a proper incident of the operations of the railway. Nor should the rights of signaling be made to depend upon the actual existence of a necessity for it, for the footman might be aware of the approach of the train and intend to step aside in safety. The blowing of the whistle in that case would not be necessary, but to the engineer might reasonably appear to be necessary and would undoubtedly be proper.

It results from these conclusions, and has been held by this court, that the mere sounding of the locomotive whistle, even at a place of extraordinary danger, is not negligence *per se*. *Cincinnati, etc., R. W. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep. 334; *Indianapolis, etc., R. W. Co., v. Boettcher*, 133 Ind. 82. See, also, Elliott's Railroads, section 1264, and Wharton's Neg., section 836.

It is also true that for negligence in the blowing of the locomotive whistle, and the making of other noises, such as permitting steam to escape, from which horses are frightened and caused to do injury, railway companies are liable. Elliott on Railroads, section 1264; *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166; *Indianapolis, etc., R. W. Co. v. Boettcher, supra*; *Louisville, etc., R. W. Co. v. Schmidt, supra*; Wharton's Neg., section 836; *Hudson v. Louisville, etc., R. R. Co.*, 14 Bush. (Ky.) 303; *Omaha, etc., R. W. Co. v. Clark*, 35 Neb. 867, 23 L. R. A. 504, 55 Am. & Eng. R. W. Cases, 145, 53 N. W. 970; *Georgia R. R. Co. v. Carr*, 73 Ga. 557.

Rodgers v. The Baltimore and Ohio Southwestern R. W. Co.

The learned counsel for the appellee suggests that the liability must depend upon the presence of special facts, such as the knowledge of the presence of horses which are frightened or which will probably become frightened, and cause injury.

No doubt the presence of such special facts may be influential in determining the existence of negligence, and certainly would tend strongly toward the conclusion of wilfulness, but we have not met with an authority to the effect that negligence in the use of the whistle or in suffering steam to escape, or the like, depends upon any such special facts. The existence of negligence, in a case like this, should be determined, as in other cases, from all of the facts and circumstances present at the time, and with regard for the rights and duties of the parties respectively. It is but natural that horses should become frightened by sudden and extraordinary sounds, a fact to be observed alike by railroad operatives and by those who drive the horses near railways. It is proper for companies to employ the locomotive whistle, and it is proper also for a teamster to drive his team upon a public way upon which a railway is operated. The care which the driver of the team should employ is of the general character of that which the driver of the locomotive should employ: a reasonable care for his own safety, and for that of each other, and each must, in his use of the way, to a reasonable extent, anticipate the use by the other.

The complaint, in general terms, alleges the blowing of the whistle "carelessly, negligently, recklessly, and without any necessity whatever."

Doubtless this allegation could have been made more specific, but with that question we are not concerned further than to say that, if a motion to that effect were the proper step, a demurrer does not raise the question.

Sharts v. Holloway.

In *Cincinnati, etc., R. W. Co. v. Gaines, supra*; *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551; *Pittsburg, etc., R. W. Co. v. Hixon*, 110 Ind. 227; *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196; *Deller v. Hofferberth*, 127 Ind. 414; *Board, etc., v. Huffman*, 134 Ind. 1; *Evansville, etc., R. W. Co. v. Krapf*, 143 Ind. 647; *Louisville, etc., R. W. Co. v. Bates*, 146 Ind. 564, and in other cases, this court has decided that, as a rule of pleading, it is sufficient, as against a demurrer, to characterize an act as having been negligently or carelessly done. In our opinion the complaint stated a cause of action, and the appellee's demurrer should have been overruled. The judgment is reversed.

SHARTS v. HOLLOWAY.

[No. 18,804. Filed May 11, 1898.]

REAL ESTATE.—Wife's Inchoate Interest.—Release Of.—A husband made a contract to convey certain real estate in which contract his wife did not join. Upon his refusal to execute the conveyance suit for specific performance was commenced, and *lis pendens* notice setting forth a description of the real estate and the nature of the plaintiff's rights and interest sought to be enforced was duly filed. Pending suit for specific performance the husband and his wife joined in a conveyance of the real estate to S, who reconveyed to the husband. The court afterwards ordered a conveyance by the husband under the contract, which conveyance was made by a commissioner. *Held*, in an action by the vendee against the wife to quiet title, that by joining in the deed to S she had relinquished her inchoate interest in the real estate.

From the Marion Superior Court. *Affirmed*.

Holtzman & Leathers, for appellant.

H. J. Milligan, for appellee.

MCCABE, J.—The appellee sued the appellant to quiet title to certain described real estate in the city of Indianapolis. The issues made were tried by the court, resulting in a special finding of the facts, whereon

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Sharts v. Holloway.

the court stated conclusions of law leading to judgment and decree quieting title in the plaintiff, appellee. The sole question presented by the record and assignment of errors relates to the conclusions of law.

The substance of the facts found are, that on November the 8, 1894, Walter D. Sharts was the owner in fee simple of the real estate described in the complaint, and on that day the plaintiff Holloway commenced his action in the court below against said Walter D. Sharts for specific performance of a certain contract in writing by and between said defendant Sharts and said plaintiff Holloway, by which the former agreed to convey said real estate to the latter in consideration whereof the latter agreed to convey certain other real estate to the former; that at the same time said plaintiff filed with the clerk of the circuit court of Marion county a written *lis pendens* notice setting forth a description of the real estate described in the complaint, and the nature of the plaintiff's rights and interest sought to be enforced against the same, which notice was immediately recorded in the *lis pendens* record by the clerk of said circuit court. Such proceedings were had in said action that a decree was entered in said cause on December 16, 1895, and said Walter D. Sharts was ordered by said decree to convey said real estate to the plaintiff, and on failing to do so, a commissioner was appointed to make such conveyance. And the plaintiff was ordered by the court to convey said other real estate to said Sharts, in which the wife of the plaintiff Holloway should join. Plaintiff Holloway made such conveyance, his wife joining therein, and said Walter D. Sharts refusing to make such conveyance he was so ordered to make, the said commissioner conveyed the property described in the complaint herein to the plaintiff Holloway, on December 26, 1895, pursuant to said order.

Sharts v. Hollowoy.

That the defendant Bertha L. Sharts was married to Walter D. Sharts on July 5, 1892, and has been his wife continuously since said date, and still is his wife, but she was not made a party to said action for specific performance; that after said action for specific performance was begun to wit, on April 24, 1895, said Walter D. Sharts, and defendant herein, his wife Bertha L. Sharts, executed to Sarah E. Sharts, mother of said Walter D., a warranty deed conveying to said Sarah E. Sharts the real estate described in the complaint herein, duly acknowledged, and the same was duly recorded on April 27, 1895, for the expressed consideration of \$1,400.00, subject to a certain building association mortgage in the sum of \$900.00. But there was no actual consideration of any kind whatever. It was expressly understood and agreed at the time of said conveyance that said Sarah E. should hold the title to said real estate, and reconvey the same to said Walter D. Sharts at any time he should demand the same, or if said action for specific performance which was then pending should be decided in favor of plaintiff herein. It was expressly understood and agreed at the time of such conveyance that said Sarah E. Sharts should, during the time she held the title aforesaid, pay and keep up the regular installments upon said building association loan, and that upon the reconveyance of said real estate to said Walter D. Sharts he would repay her for all sums of money which she might expend for such purpose. The understanding and agreement with Sarah E. Sharts as to how she should hold said real estate, and as to the reconveyance thereof, and as to the payment and repayment of the building association dues, was not in writing. Afterwards to wit, on October 24, 1895, while said action for specific performance was still pending, said Sarah E. Sharts, upon demand of said

Sharts v. Holloway.

Walter D., reconveyed to said Walter D. Sharts, in pursuance of said agreement, the real estate described in the complaint herein, by warranty deed, which was duly recorded in the proper recorder's office on the — day of —, 1895; and after said deed was so made said Walter D. Sharts fully repaid to said Sarah E. Sharts all sums of money she had paid in keeping up the regular installments on said building association loan. The conclusions of law are, that the plaintiff is the sole owner in fee of the real estate described in the complaint herein, and that the defendant has no interest in or title to said real estate, and that the plaintiff is entitled to have his title quieted. If the conveyance by the appellant and her husband to Sarah E. Sharts, his mother, pending the suit by the appellee Holloway for specific performance, had not been made, and the conveyance by her back to Walter D. Sharts, also while the said suit was pending, had not been made, we should have a very different question before us. The contract to convey the real estate in question having been made while appellant was the wife of Walter D. Sharts, she not being a party to such contract, and not a party to the suit to specifically enforce it, had she stood her ground, the decree could not affect her inchoate interest in the real estate in question, because it is provided by our statute of descents that: "No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be a party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or her jointure, or preclude her from the recovery thereof, if

Sharts v. Holloway.

otherwise entitled thereto." Section 2660, Burns' R. S. 1894 (2499, R. S. 1881). But here the appellant instead of standing on her inchoate rights as wife of Walter D. Sharts, joined him in a deed conveying to Sarah E. Sharts his entire title, thereby extinguishing her inchoate interest. It is true the conveyance pending the suit left the title in the hands of the grantee, *pendente lite*, subject to whatever decree was rendered. But the title was conveyed back to her husband, and again he became seized of an estate in fee simple in said real estate, and she became clothed with an inchoate interest, but that interest became subject to whatever infirmities that attached to the new title her husband acquired by the reconveyance. That infirmity was the outstanding equitable title created in the appellee Holloway to the real estate. That equitable title was older, and therefore paramount to appellant's marital rights in the land created by the reconveyance to her husband. Her marital rights in the land before she joined her husband in the conveyance thereof to his mother Sarah E. Sharts were prior and superior to the equitable title in appellee, created by her husband's contract to convey to appellee Holloway. But she extinguished that prior right by joining her husband in the conveyance to his mother Sarah E. Sharts. When the latter conveyed the land back to appellant's husband, she occupied the same situation that she would have occupied if the prior contract of her husband to convey the land had been made by a stranger who was a prior owner while a suit for specific performance of that contract was pending. In other words, if a husband receive a conveyance of land on which there is an outstanding lien, or an equity that is binding on him, the wife has no inchoate interest in such land as against such outstanding equity or lien. In *Buser v. Shepard*, 107

Sharts v. Holloway.

Ind., at p. 424, this court said: "Even if the sale had been within the act of 1875, since, by joining her husband in a conveyance to Myers, she extinguished her inchoate interest for the time being, she was not in a position to claim that the reconveyance from Myers restored her to her original interest, free from the incumbrance of the mechanic's lien. By the reconveyance from Myers, her husband took a new estate in the land, as of the date of such reconveyance. The estate which he then took, as well as the inchoate interest which accrued to his wife, was subject to the existing incumbrance, and the interests of both were bound by the decree which was afterwards given in the suit pending at the time the reconveyance was made." It has recently been held by this court, that where the husband acquires title to land which is at the time subject to a lien in his hands, his wife acquires no interest in the land as against such lien. *Vandevender v. Moore*, 146 Ind. 44-51; *Kissel v. Eaton*, 64 Ind. 248. The same principle is involved here. When appellant's husband acquired the title the last time, it was but the naked legal title, with a suit pending to enforce an outstanding equitable title. That title was binding on him, regardless of the pending suit for the specific performance of the contract to convey. And, as his wife acquired her interest through the husband, it is subject to all the liabilities the husband's title is subject to when it comes into existence. The superior court did not err in concluding as matter of law that appellant had no interest in the real estate in controversy. The judgment is affirmed.

Allen v. Adams et al.

ALLEN v. ADAMS ET AL.

[No. 18,450. Filed May 11, 1898.]

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NEW TRIAL.—*Time of Filing Motion.—Statute Construed.*—Where a finding of the circuit court was made on the 29th day of the November term, 1895, on December 28th of that year, and judgment not rendered till December 7, 1896, being the 13th day of the November term, 1896, three terms of court having intervened between the finding and the entering of judgment, a motion for a new trial on January 29, 1897, is too late. *p. 410.*

QUIETING TITLE.—*Sale of Wrong Tract of Real Estate by Sheriff.*—*Answer.*—In satisfaction of an execution A turned out to the sheriff a certain described tract of real estate which was sold by the sheriff by an incorrect description so as to seem to convey another tract of A's real estate. A then sold the land turned out to the sheriff, one of the conditions being that the purchaser should redeem same from sheriff's sale. The purchaser borrowed the money to make the redemption from C, assigning as collateral security the sheriff's certificate. The money so borrowed was repaid, but C neglected to reassign the certificate. C afterwards took in his own name a deed from the sheriff of the land incorrectly described in the certificate, and executed a quitclaim deed to B. In a suit brought by B for the partition of the real estate which A had never turned out to the sheriff, but which was improperly described in the certificate, A filed cross-complaint setting up the foregoing facts, and asked that his title be quieted. *Held*, that, the cross-complaint stated facts sufficient to constitute a cause of action. *pp. 412, 413.*

From the Vigo Circuit Court. *Affirmed.*

I. N. Pierce and *S. R. Hamill*, for appellant.

S. B. Davis, *S. M. Reynolds*, *G. M. Davis* and *C. F. McNutt*, for appellees.

HOWARD, C. J.—This was an action for partition of real estate, brought by appellant against appellees. To the complaint the appellee Andrew J. Adams appeared, and filed his separate answer in general denial. He also filed two special pleas, the first being called a paragraph of answer, and the second a cross-complaint. In each of these special pleas the facts are set out, and the prayer is to quiet title in appellee

Allen v. Adams et al.

to all the land. A demurrer "to the answer and cross-complaint" was overruled. The issues being then joined, there was a finding and judgment in favor of the appellee Andrew J. Adams. A new trial as of right having been granted, the special judge below was appointed to try the case. The finding, or decision, on the second trial reads as follows: "Come again the parties by attorneys aforesaid, and the evidence in this cause being concluded, and the court having heard the argument of counsel, and being advised, finds for the defendant Andrew J. Adams on the complaint, that the plaintiff take nothing by his action; and finds for said defendant on his cross-complaint, that he is entitled and ought to have his title to the real estate set out in the complaint quieted in him as against plaintiff."

This decision was rendered on December 28, 1895, being the 29th day of the November term, 1895, of the Vigo Circuit Court. On December 7, 1896, being the 13th day of the November term, 1896, of said court, judgment on the finding was entered in favor of the appellee Andrew J. Adams; and thereafter, on January 29, 1897, the appellant filed his motion for a new trial, which was overruled, and this appeal followed.

One of the rulings complained of is the overruling of the motion for a new trial. Appellee, however, contends that this motion came too late.

Except where the causes for a new trial are discovered after the term, the statute which provides for the time when the motion may be made is section 570, Burns' R. S. 1894 (561, R. S. 1881), which reads as follows: "The application for a new trial may be made at any time during the term at which the verdict or decision is rendered, and if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term, then on the first day of

Allen v. Adams et al.

the next term of such court, whether general, special or adjourned."

In this case, as we have seen, the finding of the court was made on December 28, 1895, at the November term, 1895, while the motion for a new trial was not filed until January 29, 1897, at the November term, 1896. We know that December 28, 1895, was not the last day of the November term, 1895, of the Vigo Circuit Court; and we also know that three regular terms of said court intervened between the November term, 1895, and the November term, 1896.

We think it very plain, from the terms of the statute above cited, as well as from numerous decisions of this court, that the motion for a new trial came too late. The record does not show any agreement to extend the time for filing the motion.

It was said by Worden, C. J., in *Wilson v. Vance*, 55 Ind. 394, that, "The term 'decision,' as used in the above statute, is clearly used in the sense of finding upon the facts, where the cause is tried by the court. As the motion is to be made at the term at which the verdict or decision is rendered, and as the causes are to be filed at the time of making the motion, it follows that they must be filed at that term. The statute is imperative, and the court cannot grant time beyond the term against the consent of the parties."

See, also, *Christy v. Smith*, 80 Ind. 573; *Rodefer v. Fletcher*, 89 Ind. 563; *Jones v. Jones*, 91 Ind. 72; *Dodge v. Pope*, 93 Ind. 480; *Evansville, etc., R. R. Co. v. Maddux*, 134 Ind. 571.

Complaint is also made that the court erred in overruling appellant's "demurrer to the answer and cross-complaint." This demurrer reads as follows: "Comes now said plaintiff and demurs to the separate answer and cross-complaint of defendant Andrew J. Adams, and for cause says, that said answer does not state

Allen v. Adams et al.

facts sufficient to constitute a defense to plaintiff's complaint herein, and said cross-complaint does not state facts sufficient to constitute a cause of action against plaintiff."

Whether it is proper practice to file a single demurrer to two distinct pleadings, as, in this case, to an answer and to a cross-complaint, may be doubted. But without further considering the propriety of such practice, it is clear that, so far at least as the answer before us is concerned, there can be no question that the demurrer was properly overruled, since one paragraph of the answer is a general denial.

The facts set up in the cross-complaint, besides constituting a defense to the action stated in the complaint, also make out a cause of action entitling the defendant to a decree quieting his title to the land in controversy. These facts may be sufficiently stated as follows: An execution had been issued upon a judgment against the appellee, and in satisfaction of this execution he turned out to the sheriff a certain described piece of real estate. This real estate was sold by the sheriff by an incorrect description, so as to seem to convey the land in controversy, also belonging to appellee. The land so turned out to the sheriff was thereupon sold by appellee, one of the conditions of the sale being that the purchaser should redeem the land from the sheriff's sale. The purchaser borrowed from one Carithers the money to make the redemption, giving to Carithers, as collateral security, the sheriff's certificate. The money so borrowed was afterwards repaid, with usurious interest; but the purchaser neglected to have the sheriff's certificate re-assigned, and Carithers afterwards took a deed from the sheriff in his own name, and then made a quit-claim deed for the land to appellant. The land described in the sheriff's certificate and in the quit-claim

Vansickle et al. v. Shenk.

deed to appellant had never been turned out by the appellee, but had at all times continued to be occupied and claimed by him as his own; all of which facts were also known to appellant when he took the quit-claim deed,—appellant at the time living as tenant of appellee on the very land in controversy, and being himself appellee's son-in-law. It is evident from these facts that the land here in dispute had never ceased to be the property of appellee, and always remained in his sole, exclusive, and undisturbed possession; and also that the land turned out to the sheriff had been fully redeemed by appellee's grantee, who, through ignorance or mistake, had neglected to take up the certificate. The conduct of Carithers in taking a sheriff's deed in his own name, and of appellant, who knew all the facts, in taking a deed from Carithers for land which he knew to belong to his father-in-law, was most reprehensible. It was a righteous decision, on each trial of this case, that denied to appellant the right to filch from appellee his land by such an unconscionable scheme. The demurrer to the cross-complaint was properly overruled. Judgment affirmed.

VANSICKLE ET AL. v. SHENK.

[No. 18,289. Filed May 12, 1898.]

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FRAUDULENT CONVEYANCES.—*Action to Set Aside.*—*Complaint.*—An allegation in a complaint to set aside a conveyance as fraudulent that grantor had not, at the time of the conveyance and suit, property, subject to execution, sufficient to pay plaintiff's judgment amounts to an allegation of insolvency. *p. 414.*

EVIDENCE.—*Weight Of.*—*Action at Law and Suits in Equity.*—The rule of this court against weighing the evidence and passing upon conflicts therein admits of no distinction between actions at law and suits in equity. *pp. 414, 415.*

SAME.—*Fraudulent Conveyances.*—Evidence of dealings and declarations of grantor subsequent to the conveyance, as tending to show fraud upon his part, is admissible as against the grantor in the trial of an action to set aside such conveyance as fraudulent. *pp. 415, 416.*

Vansickle *et al.* v. Shenk.

FRAUDULENT CONVEYANCES.—Execution.—Proof.—Promissory Notes.

—It is not necessary that plaintiff, in an action to set aside a conveyance as fraudulent, prove a refusal by defendant to turn out notes before he could maintain that the debtor had no property subject to execution, as section 736, Burns' R. S. 1894, makes promissory notes leviable upon condition that the execution defendant give them up, and the burden is upon the debtor to disclose not only ownership, but his willingness to turn them out for levy. *pp.* 416, 417.

EVIDENCE.—Fraudulent Conveyances.—Character of Grantor.—Evidence as to the reputation of grantor for honesty and fair dealing is not admissible in the trial of an action to set aside a conveyance as fraudulent. *p.* 417.

From the Tipton Circuit Court. *Affirmed.*

Waugh, Kemp & Waugh and *Moore, Cooper & Cooper*, for appellants.

Moon & Wolf, for appellee.

HACKNEY, J.—This was a suit by the appellee to set aside a conveyance, alleged to be fraudulent, by Gilbert Vansickle to his co-appellant.

The sufficiency of the complaint is denied, because of the absence of allegations that the grantor was "insolvent" at the time of the conveyance and at the time the suit was brought. It was alleged, and this is conceded, that at said times the grantor had not property, subject to execution, sufficient to pay the appellee's judgment. This allegation was sufficient: *Slagle v. Hoover*, 137 Ind. 314; *Roberts v. Farmers & Merchants Bank*, 136 Ind. 154; *Gable v. Columbus Cigar Co.*, 140 Ind. 563; *Hogan v. Robinson*, 94 Ind. 138; *York v. Lockwood*, 132 Ind. 358.

The alleged condition of the grantor was that of insolvency. *State, ex rel., v. Harper*, 120 Ind. 23. The cases of *Crow v. Carver*, 133 Ind. 260, and *Shew v. Hews*, 126 Ind. 474, do not hold otherwise.

While conceding a conflict in the evidence upon the question of fraud, counsel urge that, because the suit

is of equitable cognizance, this court should weigh the evidence and pass upon the conflict. Much of the evidence was oral, and its weight, to a considerable degree, depended upon the credibility of the witnesses. The rule that this court will not weigh the evidence has its chief support in the fact that it cannot observe the witnesses and consider their appearance and deportment during their examination. The reason supporting the rule seems not to admit of distinction as between actions at law and suits in equity. While there are cases in which this court is required to weigh the evidence, they are exceptions to the general rule, and this case is not one of that class.

The cases of *Eiler v. Crull*, 112 Ind. 318, and *Towns v. Smith*, 115 Ind. 480, are cited by the appellants to the proposition that the statute affording proceedings supplemental to execution would have been an effective legal remedy, in that it would have reached notes held by the grantor for the purchase money for the land conveyed, and that, therefore, the remedy here sought was not available. The cases cited do not so hold, and the contrary doctrine is held in *Rhodes v. Green*, 36 Ind. 7, and *Gable v. Columbus Cigar Co.*, *supra*. The holding in the latter cases must find ample support in the rule that it is sufficient, in suits of the character of the present, to show that the debtor had not property subject to execution.

A question is made as to the admissibility of certain evidence of dealings and declarations, subsequent to the conveyance in question, by the grantor, as tending to exhibit fraud upon his part in said conveyance. The objection which was by the appellants jointly, and is only presented in that form, was that a grantor may not disparage the title of his grantee by declarations subsequent to the conveyance.

The rule in this State, and in other jurisdictions is,

Vansickle *et al.* v. Shenk.

that as against the grantor, the debtor, where he is a party to the suit, such evidence is admissible to show his motive or purpose in making the conveyance. *Brucker v. Kelsey*, 72 Ind. 51; *Hogan v. Robinson*, *supra*; *Hunsinger v. Hofer*, 110 Ind. 390; *Stowell v. Hazlett*, 66 N. Y. 635; *Hairgrove v. Millington*, 8 Kan. 480; *White v. Perry*, 14 W. Va. 66; *Brittain v. Crowther*, 54 Fed. 295; *Bump on Fraudulent Conveyance* (4th ed.), section 599. Of course this rule should not be confused with the one which forbids that a declaration by a grantor shall be received to impair the force of his deed previously made, or that such subsequent declarations are inadmissible against the grantee. Here it does not appear that objection was made on behalf of the grantee, nor is it to be presumed that the evidence, admissible for any purpose, was considered for an improper purpose.

The court rejected evidence offered as to the value of notes claimed by the appellants to have been executed by the appellant grantee, to the grantor. The notes were not subject to execution, and, for the reasons already stated, were important, not as showing the possession by the grantor of property from which the debt could be made, but as showing the *bona fides* of the conveyance. For this purpose, their value was not in question. Counsel insist, however, that appellee should have proved an execution upon his judgment, a demand upon the same, and a refusal by the debtor to turn out notes before he could maintain that the debtor had no property subject to execution. The statute, section 736, Burns' R. S. 1894 (724, R. S. 1881), alone makes promissory notes leviable, and that is upon the condition that the execution defendant give them up. *Steele v. McCarty*, 130 Ind. 547. The burden is therefore upon the debtor to disclose not only the ownership, but his willingness to turn them out for levy.

Garrison v. Garrison.

The trial court excluded also evidence of the reputation of the grantor for honesty and fair dealing, as offered on behalf of the appellants. This ruling was right. *Continental Ins. Co. v. Jacknichen*, 110 Ind. 59; *Elliott v. Russell*, 92 Ind. 526; *Gebhart v. Burkett*, 57 Ind. 378; *Church v. Drummond*, 7 Ind. 17; *Rogers v. Lamb*, 3 Blackf. 155; *Gunderson v. Richardson*, 56 Iowa 56, 8 N. W. 683, 41 Am. Rep. 81; *Barton v. Thompson*, 56 Iowa 571, 9 N. W. 899, 41 Am. Rep. 119; *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. 674, 16 Am. Dec. 460; *Porter v. Seiler*, 23 Penn. St. 424, 62 Am. Dec. 341; *Thompson v. Bowie*, 4 Wall. 471; *Smets v. Plunket*, 1 Strob. (S. C.) 372; *Sturgeon v. Sturgeon*, 4 Ind. App. 232; *Gutzwiller v. Lackman*, 23 Mo. 168. The last of these cases and that of *Church v. Drummond*, *supra*, are directly in point. All of the cases hold that if character is not directly involved, such evidence is not admissible.

Finding no available error in the record, the judgment of the trial court is affirmed.

GARRISON v. GARRISON.

[No. 18,494. Filed May 18, 1896.]

DIVORCE.—Allowance to Wife.—Section 1054, Burns' R. S. 1894, does not provide for any allowance by the court to a wife's attorneys on decreeing to her a divorce, or refusing one to her husband, the allowance must be made to the wife, on her petition.

From the Marion Superior Court. *Affirmed.*

D. M. Bradbury and *Frank W. Ballenger*, for appellant.

HOWARD, C. J.—There is much confusion in the transcript filed on this appeal. Fred Garrison brought his action for divorce against Nona, or Nora, Garrison, which action resulted in a finding and judg-

Garrison v. Garrison.

ment for the defendant. Before answering the complaint the defendant had filed her "application for an allowance." The record shows that the "motion and affidavit for an allowance" was overruled, to which ruling there was an exception, and ten days were allowed for filing a bill of exceptions. This bill was never filed. After the entry of the judgment refusing the divorce, the record shows that the defendant filed another "motion for an allowance." This motion also was overruled; an exception was taken to the ruling, and thirty days were granted for a bill of exceptions. In the bill of exceptions filed, no motion by the defendant for an allowance is shown, but a request is set out, as made by the defendant's attorneys, asking "the court to make them an allowance, as such attorneys, in the sum of one hundred dollars. This allowance, it is shown, "the court refused, on the ground that this is not a proper case for an allowance."

The assignment of errors reads as follows: "Fred Garrison v. Nora Garrison. The defendant comes and says that there is manifest error in the record in this cause in this: That the court erred in overruling appellant's motion for an allowance of her attorney's fee incurred in conducting the defense in said cause."

As the parties stand in this assignment, Fred Garrison appears as appellant, but he has taken no appeal. If we should take Nora Garrison as appellant, notwithstanding her name appears as appellee in the title of the case, and she is named "defendant" in the body of the assignment, still the assignment of errors would be unavailing, for the bill of exceptions does not show any motion by her for an allowance for her attorney's fees.

Moreover, even if the assignment were properly

Demaree et al. v. Johnson et al.

made, we do not think any error would be shown. The statute cited by counsel, section 1054, Burns' R. S. 1894 (1042, R. S. 1881), does not provide for any allowance by the court to a wife's attorneys on decreeing her a divorce, or refusing one to her husband, but provides that in either of such cases the court shall "require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the petition." The allowance should be made to the wife, on her petition, not to her attorneys, on their petition. The wife employs her own attorneys; they are not assigned by the court, nor are they to be paid on its order. Judgment affirmed.

DEMAREE ET AL. v. JOHNSON ET AL.

[No. 18,193. Filed April 7, 1898. Rehearing denied, and Mandate modified May 13, 1898.]

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APPEAL.—Bond on Appeal from Board of Commissioners to Circuit Court.—Presumption.—The bond to be filed with the county auditor on appeals from the board of county commissioners, as provided by section 7860, Burns' R. S. 1894, is no part of the proceedings of the board, and on appeal of such a cause, from a judgment of the circuit court to the Supreme Court, it will be presumed in the absence of any showing to the contrary that the bond was filed with the auditor and delivered to the clerk as provided by the statute. pp. 420, 421.

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ELECTIONS.—Voting Aid by Township to Railroad.—Notice of Election Essential.—Under section 5342, Burns' R. S. 1894, providing as to the manner of voting by a township of aid to a railroad company, the giving of notice is essential to the validity of the election. p. 422.

RAILROADS.—Public Aid.—Statutes Strictly Construed.—Railroad aid laws, as they, in a manner, deprive the owners of the full control and disposition of their property, by giving to others the power to encumber it, should be strictly construed in favor of the rights of property. p. 423.

SAME.—Public Aid.—Irregularities of Election.—A railroad aid tax will not be overthrown for mere irregularities in the election that do not affect substantial rights. p. 423.

ELECTIONS.—Public Aid to Railroad.—Bribery.—An election to

Demaree *et al.* v. Johnson *et al.*

determine whether a township will vote aid to a railroad will be vitiated where fraud and bribery were practiced to such an extent as to affect the result. p. 423.

RAILROADS.—*Public Aid.*—*Tax Levy.*—*Remonstrance.*—Where only the legality of the election and the action of the board of commissioners in making the levy is questioned, a remonstrance against the levy, on the ground that it was placed upon the tax duplicate before the road had been permanently located, is demurrable. p. 423.

ELECTIONS.—*Public Aid to Railroad.*—*Notice of Election.*—*Statute Construed.*—The provision of section 5342, Burns' R. S. 1894, that the sheriff shall post copies of the notice of election in the township where the election is to be held is directory as to the manner of giving notice, the actual giving of notice being the essential requirement. p. 427.

From the Johnson Circuit Court. *Reversed.*

R. M. Miller, H. C. Barnett and Maurice Douglass,
for appellants.

F. E. Gavin, C. F. Coffin, T. P. Davis, T. W. Wool-
len, G. M. Overstreet, Jesse Overstreet and J. V. Oliver,
for appellees.

HOWARD, C. J.—The questions discussed on this appeal relate to the voting by a township of aid to a railroad, under provisions of section 5340, Burns' R. S. 1894 (4045, R. S. 1881), and following sections.

The board of commissioners of Johnson county, over the remonstrance of appellants, found that on December 21, 1894, the voters of Pleasant township, in said county, at an election duly held for that purpose, decided, by a majority of 53 votes, that a tax of \$34,000.00 should be levied in said township in aid of the construction of the Indianapolis, Greenwood and Franklin railroad. Thereupon the board ordered the levy of a tax, in pursuance of the provisions of the statutes above cited.

It is first contended by appellees that the record shows no appeal to the circuit court from this action of the county board, and they move for the dismissal

Demaree et al. v. Johnson et al.

of the appeal to this court, for the reason that, "No appeal bond was filed by the appellants with the auditor of Johnson county, nor was any bond approved by said auditor, as required by law for the taking of an appeal from the order of the board of county commissioners."

Counsel cite *Shirk v. Moore*, 96 Ind. 199, which decides that if no appeal bond is filed with the auditor, the appeal may be dismissed in the circuit court. A like decision was made in *Crumley v. Hickman*, 92 Ind. 388. In those cases, however, the objection was taken in the circuit court. Here, there is nothing to show that any motion was made in the trial court to dismiss the appeal; or that any suggestion was there made that no appeal bond had been filed.

It is provided in section 7860, Burns' R. S. 1894 (5773, R. S. 1881), that an appeal from the county board to the circuit court shall be taken "by the appellant filing with the county auditor a bond." But there is no requirement that this bond, or a copy thereof, shall be made a part of the record in the circuit court. The succeeding section, section 7861, Burns' R. S. 1894 (5774, R. S. 1881), provides that, "Within twenty days after the filing of such appeal bond, the auditor shall make out a complete transcript of the proceedings of said board relating to the proceedings appealed from, and shall deliver the same, and all the papers and documents filed in such proceedings, and the appeal bond, to the clerk of the court to which the appeal is taken." All that needs to appear, then, in the auditor's transcript, is a copy of the proceedings of the board. The bond is no part of those proceedings; but is simply to be transmitted to the clerk with the other papers and documents. In the absence of any showing to the contrary, and of any objection taken in the court below, we must pre-

Demaree et al. v. Johnson et al.

sume that the bond was filed with the auditor and delivered to the clerk, as required by the statute, and that the court therefore rightfully assumed jurisdiction of the appeal from the county board.

In the circuit court the appellants amended and re-filed their remonstrance against the order of the board. To the first, second, third, fourth, eighth, ninth, tenth, eleventh, and twelfth specifications of the remonstrance the court sustained a demurrer, and the appellants, standing by their remonstrance so made and demurred to, and refusing to plead further, this appeal followed.

It is provided in section 5342, Burns' R. S. 1894 (4047, R. S. 1881), that the county auditor shall give notice of the election to be held for voting aid to the construction of a railroad, by publication for at least four weeks in some newspaper of general circulation, and also by printed handbills to be posted by the sheriff in ten public places in the township three weeks prior to the election.

In the first, second, and third specifications of remonstrance it is averred that the notice so required was not given. The first specification reads as follows: "Because no notice was given to the voters of the pretended election held in said Pleasant township on the 21st day of December, 1894, relative to the making of such appropriation." The demurrer admits the truth of this averment, and it is no answer on this appeal to say, as counsel do, that some form of notice was given, and that such notice was by the board deemed sufficient. If such were the case, appellees should have replied to the remonstrance, and made proof of the notice, if any, which was given, so that it might be determined whether the same were sufficient. On a collateral attack it might be presumed that the board found that notice was given,

Demaree et al. v. Johnson et al.

and that the same was sufficient (*Tucker v. Sellers*, 130 Ind. 514); but this is a direct appeal, and if there was in fact no notice, as admitted by the demurrer, the election should be declared void. Railroad aid laws, as they impose a burden upon the public, and, in a manner, deprive the owners of the full control and disposition of their property, by giving to others the power to encumber it, should be strictly construed in favor of the rights of property. *Garrigus v. Board, etc.*, 39 Ind. 66; *Miles v. Ray*, 100 Ind. 166.

The objection that election sheriffs were not appointed for the election, may perhaps be regarded as technical, unless some person were shown to have been thereby deprived of his right to vote, or some other serious injury were thus caused. A railroad aid tax will not be overthrown for mere irregularities that do not affect substantial rights. *Irwin v. Lowe*, 89 Ind. 540.

In the eighth, ninth, and tenth specifications of the remonstrance, it is charged that the election was vitiated by fraudulent practices, including bribery, on the part of appellees. We do not think these specifications were sufficiently explicit, so as to require that the demurrer should have been overruled. Of course, if such fraud and bribery were practiced to such a degree as to affect the result of the election, the tax ought not to stand. The unbiased vote of the people should be sought in this, as in every other election, and it might have been better that the appellees should have been ruled to reply to the charges so made.

There was no error in sustaining the demurrer to the eleventh and twelfth specifications of the remonstrance. If the tax had been legally voted, the board might rightfully levy the same. If, however, the board exceeded its duty in ordering the tax placed

Demaree et al. v. Johnson et al.

upon the duplicate before the road had been permanently located in the township, in violation of section 5368, Burns' R. S. 1894 (4068, R. S. 1881), that would be an error not affecting the questions now before us, which concern only the legality of the election and of the action of the board in making the levy.

The judgment is reversed, with instructions to overrule the demurrer to the first, second, and third specifications of the remonstrance, and to each of them, and for further proceedings.

ON PETITION FOR REHEARING, AND TO MODIFY MANDATE.

HOWARD, C. J.—The first specification of remonstrance against the levy of the railroad aid tax in this case was that no notice of the election had been given. The demurrer admitted the truth of this averment, and the court could not go elsewhere to find it untrue. As there could be no legal imposition of the tax without notice to the people of the election to be held therefor, it must follow that the demurrer to the first specification of remonstrance should have been overruled.

The second and third specifications of remonstrance were to the effect that the auditor had not delivered to the sheriff, and the sheriff had not posted the ten copies of the notice of election provided for in the statute. Counsel for appellee, however, insist that the notices required by the statute might have been delivered to some one else than the sheriff, and might have been duly posted by such other person, and hence that the people might have received the actual notice provided for in the statute, and that the failure to comply with the letter of the statute was, consequently, but an irregularity, and, as such, not sufficient to invalidate the election.

Demaree et al. v. Johnson et al.

In *Beal v. Ray*, 17 Ind. 554, it was held that a vacancy in office could not be filled at the time of a general election, when the vacancy had not occurred long enough before the election to permit the giving of the proper statutory notice. But if the vacancy had occurred long enough before the election to enable the election officers to give the required notice, then the failure to give the notice would not invalidate the election, unless it should appear that such want of notice deprived voters of knowledge of the time and place of the election, so as to change the result. The simple failure of the official to do his duty in the giving of the notice could not, of itself, deprive the people of their right to elect, when an election was provided for by law. *State v. Jones*, 19 Ind. 356, 81 Am. Dec. 356; *City of Lafayette v. State*, 69 Ind. 218. As said by Mr. Cooley, Const. Lim. 603, "Where, however, both the time and the place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it was to give notice of the election has failed in that duty."

An important distinction, however, is to be observed between general and special elections. The time, place, and manner of holding the former being fixed by law, the electors may, and indeed must, take notice of them, and as to such elections, the statutory requirement of public notice may be regarded as directory only. But as to special elections it is otherwise. As to filling vacancies, for example, which occur not in the ordinary way, by expiration of the term, but by death, resignation, or removal from office, the statute as to notice "is mandatory, and an essential prerequisite to all such elections." McCrary Elections (4th ed.), section 185. In a note to this section,

Demaree et al. v. Johnson et al.

citing *State v. Tucker*, 32 Mo. App. 620, it is said: "In special elections the notice called for by the law is absolutely essential to the validity of the election."

In section 196 of his work, Mr. McCrary says that in an election by a municipal body, authorized for the purpose of determining a particular question, as the voting of aid to a railroad, where the statute points out no mode for conducting such election, the mode provided for conducting other elections by such municipal body should be followed. From this statement, the inference would arise that if the statute provide a particular mode of conducting the election, such mode should be followed.

The rule seems to be that statutes providing the mode of proceeding by public officers are directory, and are not to be regarded as essential to the validity of the proceedings, unless there is something in the statute itself, or in its general scope and policy, which plainly shows a different intent. *Sutherland Stat. Const.*, sections 451, 452; *Endlich's Inter. Stat.*, sections 431-440.

For the validity of an election not provided for in a general statute, the giving of notice, as we have seen, is essential. But if such notice is given, if the people have been informed as to the fact, time, and place of the election, and have actually participated in it, then, the election cannot be held invalid, so far as notice is concerned, unless there is a clear intent manifest in the statute to make something relating to the manner of giving the notice essential to such validity. Of course if it were shown that the failure to give the notice in the manner provided for in the statute had resulted in preventing such a number of electors from participating in the election as would have changed the result if they had voted, then the failure to give the notice as required by the statute would be fatal.

The Carmel Natural Gas and Improvement Company v. Small *et al.*

In the light of the foregoing principles, we are, on reflection, inclined to think that the second and third specifications of remonstrance, while showing a failure of official duty on the part of the election officers, are yet insufficient to show the invalidity of the election. If the people of Pleasant township had such actual notice of the election as provided by the statute, the result of the election could not be changed by the circumstance that the notice was not given by the official appointed to that service by the statute. It would seem, then, that as to the manner of giving the notice, the statute is simply directory, the actual giving of the notice being the essential requirement.

The petition for a rehearing is therefore overruled, but the mandate is so modified that the judgment is reversed, with instructions to overrule the demurrer to the first specification of the remonstrance, and for further proceedings.

THE CARMEL NATURAL GAS AND IMPROVEMENT COMPANY v. SMALL ET AL.

[No. 18,106. Filed May 14, 1897. Rehearing denied May 17, 1898.]

INJUNCTION.—Quo Warranto.—Officers.—Information in the nature of a *quo warranto* is the proper remedy to determine the right to an office, and injunction proceedings, brought by one set of directors of a corporation, to restrain another set from interfering with them in their business will not be sustained, where the sole question to be determined by the suit is the legality of the election of the directors assuming to act for the corporation. *pp. 429, 430.*

SAME.—Legal Remedy.—Injunction will not lie where the remedy at law is sufficient and adequate. *p. 430.*

SAME.—Complaint.—Must Be Good on the Theory on which It Proceeds.—Where a complaint for an injunction does not state facts sufficient, as a complaint for an injunction, to constitute a cause of action, it will be held bad on demurrer, even though it states facts enough to be good on some other theory. *p. 431.*

APPEAL AND ERROR.—Intervening Errors.—Where plaintiff appeals, and it is shown by the record that he has no cause of action against

150	427
150	304
150	450
151	534

150	427
155	65

150	427
160	180

150	427
169	642

The Carmel Natural Gas and Improvement Company v. Small *et al.*

the defendant, intervening errors must be considered as harmless, and the judgment affirmed. *pp.* 431, 432.

APPEAL AND ERROR.—*Review.*—The Supreme Court will not review or adjudicate questions unnecessary to the decision of the case. *p.* 433.

SAME.—*Complaint.*—*Theory.*—The entire record and briefs of counsel on both sides may be considered on appeal for the purpose of ascertaining the theory of the complaint. *pp.* 434, 435.

EVIDENCE.—*Burden of Proof.*—Where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative. *p.* 440.

From the Hamilton Circuit Court. *Affirmed.*

Frank E. Gavin, Charles F. Coffin, Theo. P. Davis, L. J. Patty, S. D. Stuart and Robert Graham, for appellant.

Roberts & Vestal and Fertig & Alexander, for appellees.

MCCABE, J.—The appellant sued the appellees to enjoin them from interfering with the plaintiff's business, or collecting any of its moneys. The appellees answered, leading to issues of fact, a trial of which resulted in a general finding by the court for the defendants, upon which the court rendered judgment that the plaintiff take nothing by its complaint. The court overruled appellant's motion for a new trial, having previously overruled the plaintiff's demurrer for want of sufficient facts to the second and third paragraphs of the defendant's answer. These rulings are assigned for error. The plaintiff alleges that it is a corporation, duly organized under the laws of the State of Indiana, resident in the county of Hamilton, having a regularly chosen and elected board of directors, of which John A. Thomas is president, and Addison Newlin is secretary and treasurer, and is engaged in the business, in its corporate name of The Carmel Natural Gas and Improvement Company, of drilling wells for and supplying gas to the citizens of

The Carmel Natural Gas and Improvement Company v. Small et al.

Carmel and vicinity, in said county. The balance of the complaint and the two affirmative answers show that the stockholders of the corporation have become divided into two factions, both factions having held at the same time rival meetings of stockholders, each meeting having elected directors for the corporation, each of which sets of directors elected different presidents, secretaries, and treasurers for said corporation. A number of very interesting questions are involved, to a discussion of which the elaborate and able briefs on both sides have been devoted. If these questions are decided one way, or even one of them, then the election of directors by the stockholders adhering to the defendants, was illegal and invalid, calling for a finding and a proper judgment against such defendants, otherwise the said election was legal and valid, calling for a finding and a proper judgment in favor of said defendants. In short, the whole record, evidence, and briefs of counsel on both sides show that the sole controverted question to be determined by the suit was and is the legality and validity of the election of directors for said corporation by that part of the stockholders adhering to the appellees, which directors are assuming to act as the lawfully elected directors of said corporation. Both the statute and the common law provided an ample remedy in such a case. Sections 1145-1160, Burns' R. S. 1894; 3 Blackstone Com. 262. The statute provides that: "An information may be filed against any person or corporation in the following cases: First when any person shall usurp, intrude into, or unlawfully hold or exercise any public office or any franchise within this state, or any office in any corporation created by authority of this state." Section 1145, *supra*. Under this provision it has been held by this court that information in the nature of a *quo warranto* is a proper

The Carmel Natural Gas and Improvement Company v. Small *et al.*

remedy to determine the right to an office. *Yonkey v. State, ex rel.*, 27 Ind. 236; *State, ex rel., v. Adams*, 65 Ind. 393; *State, ex rel., v. Peterson*, 74 Ind. 174; *State, ex rel., v. Gallagher*, 81 Ind. 558. An information is the proper remedy to try the title to an office, and to oust an intruder therefrom. *Griebel v. State, ex rel.*, 111 Ind. 369. In a proceeding by information the defendant may set up and show that he was legally elected to the office in dispute. *State, ex rel., v. Shay*, 101 Ind. 36. Information is the proper proceeding to remove officers of a corporation illegally elected. *Smith v. Bank of the State*, 18 Ind. 327. Or if the complaint in the case be construed as a complaint against the defendants for wrongfully assuming to act as a corporation when they are not, information is the proper remedy. *State, ex rel., v. Beck*, 81 Ind. 500; *Board, etc., v. Hall*, 70 Ind. 469; *Mullikin v. City of Bloomington*, 72 Ind. 161; *State, ex rel., v. Town of Tipton*, 109 Ind. 73; *Smith v. State, ex rel.*, 140 Ind. 343. The legality of a corporation cannot be collaterally questioned, but must be tested by an information. *North v. State, ex rel.*, 107 Ind. 356. It has been directly held that an injunction will not lie in just such a case as this. *Hagner v. Heyberger*, 7 Watts & Serg. (Pa.) 104, 42 Am. Dec. 220. See, also, *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619. Where the plaintiff has, as here, an adequate legal remedy, injunction will not lie. *Hendricks v. Gilchrist*, 76 Ind. 369; *Caskey v. City of Greensburgh*, 78 Ind. 233; *Sims v. City of Frankfort*, 79 Ind. 466; *Smith v. Goodknight*, 121 Ind. 312; *Martin v. Murphy*, 129 Ind. 464. If the remedy at law is sufficient and adequate, equity cannot give relief by way of injunction. But the legal remedy must be as practical and efficient to the ends of justice as the remedy in equity, in order to prevent the granting of an injunction. *Thatcher v. Hum-*

The Carmel Natural Gas and Improvement Company v. Small *et al.*

ble, 67 Ind. 444; *Bishop v. Moorman*, 98 Ind. 1. The legal remedy here, however, is more adequate, and more efficient than that in equity by way of injunction. *Hagner v. Heyberger*, *supra*. The complaint, as a complaint for an injunction, did not state facts sufficient to constitute a cause of action. That was the theory on which it proceeded. It is settled law that a complaint must be good on the theory on which it proceeds or it will not be good at all, even though it state facts enough to be good on some other theory. *Copeland, Err., v. Summers*, 138 Ind. 226; *Platter v. City of Seymour*, 86 Ind. 323; *Mescall v. Tully*, 91 Ind. 96. It follows from what we have said, that the demurrer to the answers ought to have been carried back, and sustained to the complaint, and hence, that there was no available error in finding for the defendants and in overruling the plaintiff's motion for a new trial. Because appellant was not entitled to an injunction, and that is all it was seeking. Therefore the judgment is affirmed.

ON PETITION FOR REHEARING.

MCCABE, J.—We are wholly unable to see any force in the criticisms of the original opinion by the learned counsel for appellants on the ground of our refusal to go on and decide the questions arising after the complaint. We refused to consider the error assigned on the action of the trial court in overruling the demurrer to answers and in overruling the motion for a new trial, because we concluded that the complaint did not state a cause of action, holding that such demurrer ought to have been carried back and sustained to the complaint, and for that reason, regardless of the alleged intermediate errors mentioned, we affirmed the judgment in favor of the defendants. We did so because the law compelled us to do so, though if we

The Carmel Natural Gas and Improvement Company v. Small *et al.*

had been at liberty to dodge, evade, and bend the law. as the learned counsel seem to think we were and still are at liberty to do, we know of no members of the bar of this court whose affable and clever manners would more incline us to accommodate them than these same gentlemen. But we were placed in the same situation that an eminent judge of a high court recently said he desired to be placed in every case that came before him, namely: That the law would clearly compel him to decide the case one way or the other, so that when his conclusion was reached he could feel that it was a legally compulsory one.

In *Ice v. Ball*, 102 Ind., at pp. 46-47, this court said: "We are of opinion that the demurrer to the third paragraph of the answer ought to have been carried back by the court and sustained to the appellant's complaint, for we are sure that this complaint did not state a cause of action against the appellees, or either of them. * * * This conclusion renders it unnecessary for us to consider any of the other errors of which complaint is made by the appellant. Where, as here, the plaintiff appeals, and it is shown by the record that he has no cause of action against the defendants, intervening errors, if any, must be regarded as harmless, and the judgment must be affirmed. *Fell v. Muller*, 78 Ind. 507; *Rawson v. Pratt*, 91 Ind. 9; *Clawson v. Chicago, etc., R. W. Co. supra* [95 Ind. 152]."

The language of these decisions of this court is imperative, commanding that the judgment in favor of the defendant must be affirmed, if the complaint was not good, no matter how much error was committed in holding the answers good, and in overruling the motion for a new trial. Of course, the learned counsel did not cite, refer to, or mention these decisions in their brief for a rehearing.

Our Appellate Court, with which at least some of

The Carmel Natural Gas and Improvement Company v. Small *et al.*

the appellant's learned counsel now urging a rehearing here are not strangers, has said: "When an insufficient complaint is assailed by demurrer, for want of facts, and the demurrer is overruled, such ruling is to the prejudice of the demurring party. If the cause thereafter proceed to trial, and the defendant have judgment from which the plaintiff appeals, the general rule is that an appellate court will treat all errors subsequent to the ruling on demurrer as wholly immaterial and affirm the judgment."

That labor, learning, and valuable time, "were applied to the consideration of the questions presented and argued by counsel" on both sides without securing a decision thereof, is not the fault of this court, since those questions were wholly immaterial, and the rulings as to the answers and evidence, even if erroneous, were therefore harmless. The law cannot be changed by attempting to load the blame for the shortcomings of counsel on the court. But it is a terror to the upright judge even to be charged with deciding wrong. Such a charge induces him to demonstrate whether the charge is just. We do not complain that counsel thus compel us to demonstrate the correctness of our decision, but we have a right to expect counsel to apply the same rule to themselves, and they would thereby demonstrate that they were wrong, and thus save this court much useless labor on petitions for rehearing.

The rule laid down in 2 Ency. Pl. and Pr., p. 371, is stated thus: "Nor will the appellate court review or adjudicate questions unnecessary to the decision of the case. A decision on such points is mere *obiter dicta*, not binding on the trial court when the case is sent back for a new trial on reversal, nor upon the appellate court upon a second appeal of the same

The Carmel Natural Gas and Improvement Company v. Small *et al.*

case." A large list of cases is cited from the courts of last resort of many states in support of this quotation. Every interest of organized society forbids that the rule should be otherwise. The exposition of the law by the court of last resort, to be binding on those not parties to the litigation, arises out of the law of necessity. The necessity for such exposition cannot exist except there be a real and actual and *bona fide* dispute between two opposing parties, and that dispute lodged in court in the shape of a lawsuit, and from the judgment on the trial thereof there is an appeal to such court of last resort. Whatever is necessary for such court to adjudicate within the bounds of the issues, duly presented, in order to decide the case, ought to be in justice and law binding, not only on the parties to the litigation, but also on all the people of the State, as law. But whenever the appellate tribunal undertakes to adjudicate questions not necessary to the decision of the case, the law stops where necessity stops, because the court has no right to conclude strangers to the litigation; even in declaring what the law is, where there is no necessity for it. Therefore, if the complaint was bad, it would be little less than criminal folly for this court to go on laying down rules of law as to the sufficiency of the facts stated in the answers, and the sufficiency of the evidence to warrant the finding. We affirm the judgment, not because the litigation as to the sufficiency of the answers and the evidence was right, but because we hold that the court had no right to adjudicate those matters. We affirm the judgment solely because the complaint, being bad, the plaintiff was entitled to no judgment.

Nor is there any force, and far less justice, in the criticisms of the opinion by said counsel, on the ground that we, "in determining the sufficiency of the com-

The Carmel Natural Gas and Improvement Company v. Small *et al.*

plaint," took "into consideration the averments of the answers and the facts disclosed by the evidence." After stating the substance of the complaint, in the original opinion, we did say: "In short, the whole record, evidence and briefs of counsel on both sides show, that the sole controverted question to be determined by the suit is, the legality and validity of the election of directors for said corporation by that part of the stockholders adhering to the appellees, which directors are assuming to act as the lawfully elected directors of said corporation. * * * The complaint, as a complaint for an injunction, did not state facts sufficient to constitute a cause of action. That was the theory on which it proceeds. It is settled law that a complaint must be good on the theory on which it proceeds or it will not be good on some other theory." And that is all we said in that direction. We had supposed that resort to such matters was proper in arriving at the true theory of the complaint, and that was our sole purpose in such reference. And it is settled law in this State that such matters may be referred to in arriving at the true theory of the complaint. *Shew v. Heus*, 126 Ind. 476; *Hancock v. Fleming*, 85 Ind. 574; *Anderson, etc., Association v. Thompson*, 88 Ind. 414; *First Nat'l Bank, etc., v. Root*, 107 Ind. 228; *Terre Haute, etc., R. R. Co. v. McCorkle*, 140 Ind. 613, 625.

The brief to which we have referred above, says: "The complaint is by the Carmel Natural Gas Company, the corporation itself, and is directed against Levi Small and a pretended Carmel Gas Company, of which Sylvanus Carey is president. * * * That plaintiff is a duly organized corporation, having a regularly chosen and elected board of directors, of whom John A. Thomas is president, and Addison Newlin is secretary and treasurer, and that it is engaged in

The Carmel Natural Gas and Improvement Company v. Small et al.

supplying natural gas. That said board of directors were duly elected at the regular annual meeting of the stockholders of said company on the 20th day of December, 1895. Facts are set out also, showing that a former board entered into a fraudulent scheme for wrongfully and unlawfully issuing certain stock, which was at the annual meeting of the stockholders, 'repudiated, and said shares were not voted in electing the board of directors of said plaintiff.' That after the annual 'meeting and the election of the board of directors had been held, and said meeting adjourned' certain stockholders met and pretended to hold another election by voting said repudiated stock, and to select Sylvanus Carey as president, and Levi Small as secretary, and assume plaintiff's name. That said Small without being legally elected, and without right as aforesaid, is interfering with plaintiff's business and collecting the moneys due it, and has so collected a large sum of money, to wit, \$1,000.00, which plaintiff has demanded of him, and which he refuses to pay, and will continue to interfere unless enjoined. Wherefore, plaintiff asks an injunction, and 'further demands judgment against the defendants in the sum of \$1,000.00, and other proper relief.' As we have said, to sustain the opinion it must be held that all these averments, disassociated from the answers and the evidence, show no cause of action of any kind against any of the defendants, and that by the pleading no relief is sought save injunction. Most manifestly the learned judge was in error, doubtless by oversight, in his construction of this pleading. It most explicitly, and in the plainest terms demands a money judgment. In addition to that, it most assuredly discloses a right to a money judgment."

This is a tacit admission by appellant's counsel that the complaint does not state a cause of action for an

The Carmel Natural Gas and Improvement Company v. Small et al.

injunction, because its object was, as held in the original opinion, to controvert the legality of the election of the appellees to the offices of the corporation specified, among which was Levi Small as secretary, who it is alleged had collected \$1,000.00 of the moneys of the corporation.

We think, as we did before, that appellant's counsel mistook their remedy, doubtless by oversight, in failing to file an information in the name of the State on the relation of the proper person. If the validity of the election of these officers cannot be inquired into under the complaint, as appellant's counsel now tacitly admit, how can the right of Mr. Small to collect money of the corporation be questioned by seeking to recover it from him? If he was not an officer of the corporation, and hence without authority to collect its money, payment to him by its debtors would be no payment, and no collection, unless the corporation saw fit to ratify his act as its authorized officer or agent. As a condition precedent to the right to recover the money he has collected in the name of the corporation as its officer, the corporation, appellant, must show first, as alleged in the complaint: "That said Small without being legally elected * * * is * * * collecting money due it, and has so collected a large sum of money, to wit, the sum of \$1,000.00." If the allegation here of the illegality of Small's election, and the invalidity of his title to the office cannot be litigated in this form of action, then the complaint states no cause of action for a money judgment, even for the \$1,000.00. The theory of the complaint as to that \$1,000.00 is not that he has failed to pay the money over as an officer of the corporation who had rightfully collected it, but it is that he wrongfully collected it without being legally elected. The right to recover the money then is made to depend by the

The Carmel Natural Gas and Improvement Company v. Small et al.

complaint upon the question whether Small was legally elected. The allegation of the complaint on this point is: "That after said meeting and the election of the board of directors had been held, and said meeting had adjourned, certain stockholders met and pretended to elect a certain other board of directors by voting the stock of Follett & Co., which had been repudiated by a majority vote of all the shares of stock of said company as aforesaid. That said pretended board of directors, which is the same organization admitted as a defendant in this suit, pretended to elect one Sylvanus Carey as president of said company, and the defendant Levi J. Small as its secretary, and assumed the same name as the plaintiff's corporation."

This shows clearly enough that Carey, Small, and their associates were assuming and claiming to act as the corporation, and that Small in collecting the money was assuming and claiming to act as secretary, and presumably treasurer of the corporation in collecting the money, and that he was elected to such office by directors of the corporation who were elected by the stockholders thereof. And the only obstacle interposed by the complaint to his collection of the money is that he was not legally elected, admitting that he was elected, but denying the legality thereof, and basing the right to recover the money from him solely on the allegation that he was not legally elected. There is no dispute or controversy about the ownership of the money, both sides conceding that the ownership is in the corporation; the only question being who lawfully represents the corporation. As before remarked, the complaint shows that Carey, Small, and their associates are acting and claiming to act as the corporation. That involves not only the legality of their election, but whether they are a corporation.

The Carmel Natural Gas and Improvement Company v. Small *et al.*

This court has held that their right so to act can not be assailed in this way. In *North v. State, ex rel.*, 107 Ind., at p. 358, this court said: "It abundantly appears from the facts stated in each paragraph of the information, that the appellants and their associates were, and had been for many years prior to the commencement of this suit, a corporation *de facto*, if not *de jure*, acting under a corporate name, in possession of corporate property, performing corporate acts, and possessing and exercising corporate rights and franchises. In such a case, it is earnestly insisted by appellant's learned counsel that the existence of the corporation, and the rights of the appellants to act as such, can only be called in question, tried and determined in a suit or proceeding instituted on behalf of the State by the proper prosecuting attorney. Counsel are right, we think, in this position. * * * Whatever else may be said of the facts stated in either paragraph of the information, in the case under consideration, they fail to show any cause or right of action which appellee's relators might or could enforce against the appellants. It is not enough that the information should state such facts as would have required the appellants, in a suit or proceeding instituted on behalf of the State by the proper prosecuting attorney, to show by what warrant they claimed to exercise the rights, privileges and franchises of a turnpike corporation; for these facts were wholly insufficient to give the relators any cause or right of action against appellants. Upon the facts stated in each paragraph of the information, we are of opinion that the legal existence of the turnpike company named therein could only be inquired into at the suit of the State, instituted by the proper prosecuting attorney; and that neither the appellees, nor any other private person, can maintain such suit." To the same effect

The Carmel Natural Gas and Improvement Company v. Small *et al.*

are *Hon v. State, ex rel.*, 89 Ind. 249; *Williamson v. Kokomo Building, etc., Assn.*, 89 Ind. 389; *Baker v. Neff*, 73 Ind. 68; *White v. State*, 69 Ind. 273.

So that it makes no difference whether we attempt to uphold the complaint, on the ground that it seeks an injunction, or the recovery of the \$1,000.00. Because the right to the injunction is only reached by proving that the appellees were not legally elected to the corporate offices, the functions and duties of which they have been exercising. And so, too, if we attempt to uphold it solely on the ground that it seeks the recovery of a money judgment for the \$1,000.00, the right so to recover can only be reached by proving that appellees were not legally elected to the corporate offices mentioned, and hence had no right to exercise the duties and enjoy the franchises of the corporation.

So the right to question the legality of the election of those officers, or the right to question their power and authority to exercise corporate functions, as we have seen, cannot be done without filing an information in the name of the State. And that was not done in this case.

It is true the allegation of the complaint essential to the right of the plaintiff to recover the money judgment, namely, that the defendants were not legally elected, is a negative allegation. It is, however, well settled that where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative. *City of New Albany v. Endres*, 143 Ind. 203, 204, and cases there cited. Therefore, there was no cause of action stated by the complaint, either for injunction or for a money judgment. Petition overruled.

Runner, Assignee, v. Scott, Executor.

RUNNER, ASSIGNEE, v. SCOTT, EXECUTOR.

[No. 18,486. Filed May 17, 1898.]

APPEAL.—*Special Finding.*—*When Demurrer to Pleading Available.*

—The overruling of a demurrer to a pleading may be considered on appeal, notwithstanding there has been a special finding of facts with conclusions of law thereon. pp. 442-444.

COURTS.—*Assumption of Jurisdiction.*—*Presumption.*—Where a court of general jurisdiction assumes the right to issue a writ of attachment, all presumptions will be indulged in favor of the action so taken. p. 446.

ATTACHMENT.—*Appointment of Receiver to Take Charge of Attached Property.*—*No Abandonment of Attachment.*—Where a writ of attachment has been issued against partnership property in a suit against one of the partners, the subsequent appointment of a receiver for the partnership, before judgment is taken, does not work an abandonment of the attachment. p. 447.

SAME.—*Receiver in Charge of Attached Property.*—*Attachment of Property in Another County.*—*Judgment.*—Where a writ of attachment was issued against partnership property, and the property was subsequently turned over to a receiver of the firm, and another order of attachment is taken out, under which property of one of the partners in another county is taken, and the receiver reports to the court that the amount claimed by plaintiff is due him, and the court orders the attached property of the partner sold, a third party will not be heard to complain of the judgment of the court. pp. 447, 448.

SAME.—*Collateral Attack of Judgment.*—*Presumption.*—Where, in a collateral attack upon the action of a circuit court in ordering property sold which had been taken under a writ of attachment, it is not alleged that the conditions required for the validity of the judgment do not appear of record in the attachment proceedings, it will be presumed that they do appear of record, and that the judgment was authorized. p. 448.

SAME.—*Notice.*—*When Served.*—It is not necessary that notice to the defendant in attachment be served at or before the issuance of the writ. It is enough that it be served before the judgment. pp. 448, 449.

SAME.—*Collateral Attack.*—*Mortgage.*—One who takes a mortgage upon property after it has been attached is in no better position to impeach the judgment than the mortgagor. p. 449.

From the Howard Circuit Court. *Affirmed.*

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Runner, Assignee, v. Scott, Executor.

G. P. Haywood and C. A. Burnett, for appellant.

B. C. Moon and Conrad Wolf, for appellee.

HOWARD, C. J.—This was an action brought by appellant to enjoin the enforcement of a judgment in attachment. On the overruling of a demurrer to the complaint, and the filing of an answer in general denial, the cause was submitted to the court. There was a special finding of facts with conclusions of law against the appellant; and over a motion for a *venire de novo*, and a motion for a new trial, judgment was rendered in accordance with the conclusions of law.

It is contended by the appellant that the court erred in its conclusions of law, and also in overruling the motion for a *venire de novo* and the motion for a new trial.

We are, however, first met with a contention of appellees, who have assigned as cross-error that the court overruled their demurrer to the complaint. Counsel for appellant intimate that the sufficiency of the complaint, under this cross-assignment, will not be considered, for the reason that there was a special finding of facts with conclusions of law thereon; and because it has been frequently decided that errors in overruling demurrers to pleadings, when there is a special finding or a special verdict, are not material, as a correct statement of the law upon the facts found would cure the error, if any had been committed in the ruling upon the demurrers. *Scanlin v. Stewart*, 138 Ind. 574; *Woodward v. Mitchell*, 140 Ind. 406; *Ross v. Banta*, 140 Ind. 120; *Walling v. Burgess*, 122 Ind. 299, 7 L. R. A. 481; *State v. Vogel*, 117 Ind. 188; *Louisville, etc., R. W. Co. v. Downey*, 18 Ind. App. 140; *Cox v. Hayes*, 18 Ind. App. 220; *Smith, Tr., v. Wells Mfg. Co.*, 148 Ind. 333.

But by the rule thus stated, supported as it is by

the authorities cited, it is not to be understood that good pleadings are not required where there are special findings, quite as well as where the finding is general. By saying that an error made in overruling a demurrer to a pleading is not material where there is a special finding, inasmuch as a correct conclusion of law upon the facts found would cure the error, if any, the courts do not mean, as the cases cited will show, that correct pleadings may be dispensed with, but simply, that, since one who excepts to conclusions of law thereby admits that the facts have been correctly found, it will, in general, be presumed that the facts in issue are correctly stated, and, hence, that, in considering the correctness of the conclusions of law, all questions that could be raised on the sufficiency of the pleadings will necessarily be considered. It is evident that if the facts put in issue by the pleadings are correctly found by the court, then the law as applied to such facts must control the decision of the case, and, hence, that it will be unnecessary to consider any objections to the sufficiency of the pleadings.

Of course the rule has no application where a pleading is stricken out, by sustaining a demurrer to it. The rule applies only where the pleading is retained, by overruling the demurrer directed against it. Neither could the rule, strictly speaking, be applicable where facts had been found which were not within the issues made by the pleadings. Such facts should be disregarded. But a party by excepting to the conclusions of law might, perhaps, be held to have waived any such error in the finding, by admitting that the facts had been correctly found, which waiver would include, of course, an admission that the facts found were within the issues.

It is plain, therefore, that even though there has been a special finding of facts, with conclusions of law

Runner, Assignee, v. Scott, Executor.

thereon, a party may nevertheless insist upon a consideration of the correctness of the court's action in overruling a demurrer to a pleading. This is particularly true where, as in the case before us, the party who objects to the pleading did not except, and did not wish to except, to the conclusions of law, but simply insists that the pleading is defective, and that the court erred in overruling a demurrer to it. And because, by considering the conclusions of law, there might be a correct decision of the questions raised, it does not follow that the same end may not also be reached by considering the sufficiency of the pleading.

From the complaint it appears that the appellant is the assignee of the Commercial Bank of Oxford, Indiana, the deed of assignment dating from May 19, 1893; and that the appellee Scott is the executor of the last will of James T. Scott, who departed this life August 8, 1896; that on January 31, 1894, one Zimri Dwiggin and his wife executed two mortgages on the real estate in controversy, situated in Jasper county, and then owned by the said Dwiggin, to secure the payment to appellant of debts amounting to \$12,000.00; that said mortgages were foreclosed for \$13,989.95, and the lands sold to appellant for \$10,000.00, in part satisfaction of said judgment; and that appellant holds a sheriff's certificate of such sale, dated December 26, 1896. It is further alleged, that, on May 12, 1893, the said James T. Scott commenced a suit in the Howard Circuit Court to recover the sum of \$825.00 from the said Dwiggin and others, as partners, doing business under the name of the Farmers' Bank of Greentown in Howard county; that on said day said Scott, on affidavit that Dwiggin was a non-resident of the State, procured the issuance of a writ of attachment against the property of said partnership in Howard county, by virtue of which, such prop-

Runner, Assignee, v. Scott, Executor.

erty was seized by the sheriff and appraised at \$18,142.00; that on May 13, 1893, on Scott's petition, reciting the insolvency of said partnership, that there were numerous creditors, and that said Farmers' bank had suspended payment, a receiver was appointed to take charge of the assets of the partnership; and thereupon the sheriff, as ordered, turned over to the receiver all the partnership property levied upon by virtue of said writ of attachment; that after the turning over to the receiver of such attached property, on May 13, 1893, no further action was taken in the attachment proceedings until May 29, 1893, when Scott, without filing any additional affidavit or bond, and without having obtained any personal service upon Dwiggins, without having attached any property of Dwiggins in Howard county, except the partnership property already mentioned, or without having summoned any garnishee in Howard county who was then or thereafter found to be indebted to Dwiggins, or to have property in his hands subject to attachment, procured a writ of attachment to be issued by the clerk of the Howard Circuit Court to the sheriff of Jasper county, commanding said sheriff to levy upon and take into his possession the personal property, and attach the land of the defendant in said county, or so much thereof as would satisfy the claim of the plaintiff; that by virtue of said writ, and without other authority, the sheriff of Jasper county did, on May 31, 1893, attach the lands here in controversy. It is further alleged, that on April 13, 1895, the receiver of said partnership made his final report and was discharged, "and in the same order made by the court, and at the time of the hearing of said final report, and without any trial upon the question of the alleged indebtedness due the said Scott from said partnership, other than that involved in the hearing of said

Runner, Assignee, v. Scott, Executor.

final report, and without any trial of the facts or any of them, as to the matters and things alleged in said complaint in attachment, filed on the 12th day of May, 1893, as aforesaid, and without any trial by submission or otherwise of said attachment proceedings, and without any reference whatever to said attachment proceedings said Howard Circuit Court made an order finding there was a balance due the said Scott, in the sum of \$626.00, and the court thereupon caused to be entered of record a pretended judgment of \$626.00 against the real estate of the said Zimri Dwiggins, in Jasper county, Indiana, which real estate includes the real estate in this complaint hereinbefore described, and further ordered that said real estate be sold by the sheriff of Jasper county to satisfy said judgment;" that a copy of said order of sale has been issued to said sheriff, and that he will sell said land unless restrained from so doing.

The sole question for decision is, whether the writ of attachment directed to the sheriff of Jasper county, and the order of sale issued thereunder by the Howard Circuit Court are void. Whether any of the proceedings detailed in the complaint were irregular and such as might have been taken advantage of by the defendant Dwiggins on direct attack or on appeal, are not questions for our consideration. This is a collateral attack upon the proceedings and judgment of the Howard Circuit Court, and as such cannot prevail, unless such proceedings and judgment were wholly void.

The Howard Circuit Court is a court of general jurisdiction, and as such, has full authority to make orders and enter judgments in all matters relating to the attachment and sale of real estate. The statute, section 931, Burns' R. S. 1894 (919, R. S. 1881), provides that "orders of attachment may be issued to the sheriff of any other county; and several of them may,

Runner, Assignee, v. Scott, Executor.

at the option of the plaintiff, be issued at the same time or in succession." The court in this instance assumed the right to issue the writ attaching the land in dispute, and to order its sale in payment of the debt found due the plaintiff Scott. All presumptions will be indulged in favor of the action so taken by the court; and the burden was upon the appellant to allege and prove facts showing that such action was unauthorized.

Appellant insists that, by the appointment of the receiver, on May 13, 1893, and the turning over to him of the property attached in Howard county, the attachment proceedings, begun on May 12, 1893, were abandoned, and hence that on May 29, 1893, there was no authority, without a new affidavit and bond, to issue the writ of attachment to Jasper county. No facts are alleged to show a dismissal or abandonment of the attachment proceedings on the appointment of the receiver. On the contrary, the very circumstance that a second writ was issued on the 29th of May goes to show that it was then assumed that the attachment proceedings remained in full vigor. This, too, was the judgment of the court when, on April 13, 1895, it ordered the sale of the land by virtue of the writ of attachment issued on May 29, 1893. Neither is it true that the appointment of the receiver for the property in Howard county disclosed the adoption of a remedy inconsistent with the attachment proceedings, and hence an abandonment of the latter. By either remedy all the creditors could share ratably in the proceeds of the property in Howard county; and there could be no inconsistency in seizing upon other property in Jasper county, in the proceeds of which one or all of the creditors might also share as to any balance due them.

But it is said that on April 13, 1895, there was no

Runner, Assignee, v. Scott, Executor.

trial as to the attachment proceedings. It is admitted, however, that the verified complaint in attachment was before the court, as also the report of the receiver showing the balance due the plaintiff in attachment. It is not denied that Dwiggins had then been summoned, or notified by publication, and defaulted, or that he was then present in court. The attachment defendant is not complaining of the judgment then entered, and we do not think that a third party can make such complaint.

It is further argued that no judgment was authorized against the lands in Jasper, under provisions of section 931, *supra*, for the reason that on May 29, 1893, the writ of attachment was issued "without having obtained personal service upon the said Zimri Dwiggins, or without having attached any property of the said Dwiggins in Howard county (except the partnership property), or without having summoned any garnishee in said Howard county."

If any of these conditions obtained, the judgment would be authorized by the statute cited. In the first place, it is not alleged that the record does not show that some one of the conditions did exist. In the absence of an allegation that there is no such record, we must, in support of the jurisdiction exercised by the court, presume that there is such record; and if there is a record showing the existence of any of the required conditions, such record must prevail against an allegation that some one of the conditions did not exist.

Moreover, as to the first condition, it may be that up to May 29, 1893, when the writ was issued, no personal service was had upon Zimri Dwiggins; and yet such service might be had afterwards, and before the entry of judgment on the attachment. It is not necessary that notice to the defendant in attachment

be served at or before the issuance of the writ. It is enough that it be served before the judgment. Besides, Dwiggins may have appeared to the action at some stage of the proceedings. Again, the complaint does not show absolutely that property of Dwiggins had not been attached in Howard county. It is expressly admitted that partnership property of his had been so attached. The court might have deemed this a sufficient compliance with the statute; so that its assumption of jurisdiction could withstand this collateral attack, even though the assumption were in fact erroneous. All presumptions will be indulged in favor of the judgment. Elliott App. Proc., section 725.

The appellant took his mortgages, *pendente lite*, and after the land in question had been attached by the sheriff of Jasper county. He is therefore in no better position than Dwiggins himself would be if he were seeking to impeach the judgment of the Howard Circuit Court. He should therefore not only allege what was done and what was omitted by the court as affecting its jurisdiction in the matter, but it is also necessary that "he should allege in his pleading what if anything, is shown by the record" in relation to the issue which he tenders. This he has not done, and the omission is fatal to his complaint. *Exchange Bank v. Ault*, 102 Ind. 322; *Bloomfield R. R. Co. v. Burress*, 82 Ind. 83; *Krug v. Davis*, 85 Ind. 309; *Cassady v. Miller*, 106 Ind. 69; *Cosby v. Powers*, 137 Ind. 694; *Bailey v. Rinker*, 146 Ind. 129; *Davis v. Clements*, 148 Ind. 605; *Thompson v. Harlow*, *post*, 450, and authorities there cited. These cases show conclusively that the complaint was insufficient to authorize any judgment in favor of appellant. It is not therefore necessary to consider the errors assigned by him. Such errors, even if they should be found to exist,

Thompson et al. v. Harlow.

would be harmless, for the reason that under his complaint appellant could not in any case be entitled to judgment. *Carmel Natural Gas, etc., Co. v. Small, ante*, 427, and authorities there cited. Judgment affirmed.

THOMPSON ET AL. v. HARLOW.

[No. 18,461. Filed May 17, 1898.]

JUDGMENT.—Jurisdiction.—Default.—Action to Set Aside.—A complaint in an action to set aside a default rendered in a foreclosure proceeding, on a cross-complaint by plaintiff's codefendants, which alleges that plaintiff did not appear to such cross-complaint, nor give any one else authority to appear for her, is insufficient, where there is no allegation as to the finding or record of the court on the question of jurisdiction, as a judgment is not void, in the absence of fraud, if the infirmity for which it is attacked does not appear upon the face of the record. *p. 451.*

SAME.—Cross-Complaint.—Service.—Where a complaint to foreclose a mortgage makes junior lienors defendants in such manner as to raise the question of priorities between them, service upon a cross-complaint, filed by one of the defendants, attacking the lien of another defendant is unnecessary. *p. 452.*

SAME.—Complaint to Set Aside Default.—Sufficiency.—Mistake.—A complaint to set aside a default rendered in a foreclosure proceeding on a cross-complaint by plaintiff's codefendants, which alleges that plaintiff held a judgment against her husband, judgment defendant in such foreclosure proceeding; that she had been advised by friends that her judgment was valid and could not be attacked in the foreclosure suit; that the attorney for plaintiff advised her that he would set up in the complaint said judgment, and show its priority over all other liens except the mortgage; that plaintiff was an aged German lady, unable to read English intelligently, and hardly able to speak or understand the English language, and was wholly ignorant of court proceedings; that she employed an attorney to claim her inchoate one-third as against said mortgage, who did so, and then withdrew from the case, when her codefendants filed a cross-complaint, and without notice, and upon default, obtained a judgment thereon declaring her said judgment fraudulent and void, is insufficient, as the only mistake, as shown by the complaint, was one of law, and affords no relief. *pp. 452-455.*

SAME.—Complaint to Vacate.—A complaint to vacate a judgment rendered on default must state the nature and character of the original suit. *p. 455.*

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Thompson *et al.* v. Harlow.

From the Jackson Circuit Court. *Reversed.*

Oscar H. Montgomery and William T. Branaman,
for appellants.

A. N. Munden and J. H. Kamman, for appellee.

HACKNEY, J.—The appellee, by this proceeding, sought to set aside a default and decree rendered against her in the lower court upon a cross-complaint filed by the appellants in a certain foreclosure suit to which she and they were defendants.

In her complaint or petition she alleges "that she had no notice or knowledge whatever of the filing of said cross-complaint; that she did not appear to said cross-complaint, nor had any one else authority to appear for her." This feature of the complaint attacks the jurisdiction of the court over the person of the appellee as to said cross-complaint, but there is an entire absence of allegation as to the finding or record of the court as to the question of jurisdiction. All may be true that she alleges, and still there may have been a return of service, or an appearance without authority, which return or appearance the court may have adjudged upon the face of the record to be sufficient to confer jurisdiction. It has frequently been held that, in the absence of fraud, a judgment is not void if the infirmity for which it is attacked does not appear upon the face of the record. *Clark v. Hillis*, 134 Ind. 421; *Palmerton v. Hoop*, 131 Ind. 23; *Earle v. Earle*, 91 Ind. 27; *Bailey v. Rinker*, 146 Ind. 129; *Exchange Bank v. Ault*, 102 Ind. 322; *DePuy v. City of Wabash*, 133 Ind. 336; *Fitch v. Byall*, 149 Ind. 554. If, therefore, the record discloses jurisdiction, and in the absence of an allegation to the contrary we must presume that it does, the appellee's remedy is not to set aside the decree. In this respect the attack would be from matters *dehors* the record, and would

Thompson et al. v. Harlow.

be collateral. *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. 334; *Cully v. Shirk*, 131 Ind. 76, 31 Am. St. 414; *Long v. Ruch*, 148 Ind. 74; *Cosby v. Powers*, 137 Ind. 694. As held in all of these cases, a collateral attack must disclose the infirmity of the record or it will fail.

The allegations of the complaint are so meagre and unsatisfactory as to the scope of the foreclosure complaint that we are not enabled to judge whether the appellee and other junior lienors were so brought in as to raise a question of priorities between them. If it had such scope, service upon the cross-complaint attacking appellee's lien would not be necessary. *Bevier v. Kahn*, 111 Ind. 200; *Jenkins v. Newman*, 122 Ind. 99.

Another feature of appellee's complaint or petition is as to relief for "mistake, inadvertence, surprise or excusable neglect," under section 399, Burns' R. S. 1894 (396, Horner's R. S. 1897). This feature does not depend upon the invalidity of the decree, and must be considered apart from the allegations of failure to give notice of the cross-complaint, since, as we have held, it cannot be said that notice was necessary or to be expected.

It was alleged that she held a judgment against her husband, Garret F. Harlow; that she had been advised by friends that said judgment was valid and could not be attacked in the foreclosure suit; that the attorney for the plaintiff advised her that he would set up in the complaint the date of said judgment and thus show its priority over all other liens on the lands, excepting said mortgage; that according to promise he did "set up the date of said judgment;" that she employed an attorney in said suit to claim, and he did claim, her inchoate one-third as against said mortgage; that on the 22nd day of September, 1896, the

Thompson et al. v. Harlow.

attorney for the plaintiff in that suit and her said attorney "agreed in open court as to the judgment entry in said cause, namely: that only the undivided two-thirds of the lands * * * should be sold under the foreclosure proceeding, and that thereupon her counsel withdrew from said cause" and absented himself from the court; that thereafter on said day the appellants herein, who were codefendants with her in said foreclosure suit, and who had not then pleaded in said suit, filed a cross-complaint against her and others therein named, alleging that her said judgment was fraudulent and void, and did not belong to her, and prayed judgment accordingly; that thereupon she was ruled to answer said cross-complaint on the next day, and failing to do so, was, on said 23rd day of September, defaulted, and a decree was rendered against her that her said judgment was fraudulent and of no effect. It is alleged also that she was an aged German lady, unable to read English intelligently, and hardly able to speak or understand the English language; that she has always depended upon others for advice and direction in business affairs; that she is wholly ignorant of court proceedings or the rights of litigants, except as informed by others; that had she or her said attorney known that said cross-complaint was pending, she would have appeared to the same, and would have set up her defense. She then pleaded facts in support of her said judgment and its validity, and, barring the omission of any showing as to when or where her judgment had been procured, or how it became a lien upon the lands in question, she showed a meritorious defense to the charge that she had not procured the judgment by valid assignment from the party in whose favor it had been rendered.

No fraud or misrepresentation is charged, and no promise of delay or waiver of rights, or any agreement

Thompson et al. v. Harlow.

on the part of the cross-complainants is alleged. On the presumption that no service was required upon the cross-complaint, or that the court found in favor of its jurisdiction, and we must certainly indulge this presumption, the appellants, in filing their cross-complaint, the court in entering a rule for answer, and in subsequently defaulting the appellee, exercised legal rights, and only such rights as the appellee was obliged to know they possessed, and such as her attorney must have known. She expressly concedes that if she or her attorney had known of the filing of the cross-complaint she would have appeared and answered the same. Parties who are in court as litigants are bound to know the rights of other parties as to pleading and presenting issues affecting the interests of all. Counsel for the plaintiff in the foreclosure suit could make no agreement depriving the defendants therein of any rights as against the appellee. Indeed, the agreement as to the entry was only concerning the inchoate interest. The most favorable view of the facts alleged is that the appellee was ignorant of the rights of the appellants and of her own duty concerning their rights; that she made a limited employment of an attorney who, if he observed the rights of appellants and the corresponding duty of the appellee, did not advise her, and she did not seek his advice therein. On the contrary, she accepted the advice of friends, who may or may not have known that her judgment could not be attacked in the foreclosure suit. Such advice, to be a protection, must be shown to have been given by one reasonably expected to know, and under circumstances giving it credence. No such showing is here attempted. Having an attorney in the case, and failing to seek his advice, but relying possibly upon the judgment of some one as ignorant as herself, would be no diligence.

State, ex rel. Bishop, v. Crowe.

The only mistake possible, under the complaint, is one of law and not one of fact, and affords no relief. 6 Ency. Pl. and Pr., p. 167; *Chase v. Swain*, 9 Cal. 130; *Skinner v. Terry*, 107 N. C. 103; *Mayor, etc., v. Green*, 1 Hilt. (N. Y.) 393; *Shearman v. Jorgensen*, 106 Cal. 483.

The point is also made that the complaint or petition is insufficient in failing to state the nature and character of the original suit. Such statements are required. *Durre v. Brown*, 7 Ind. App. 127; *Hall v. Durham*, 116 Ind. 198; *Wills v. Browning*, 96 Ind. 149; *Lee v. Basey*, 85 Ind. 543; *Williams v. Kessler*, 82 Ind. 183. This requirement is poorly met by this petition. While a lengthy document, it abounds in general statements as to the character and nature of the suit; the allegations of the complaint therein to put in issue the priorities of alleged junior liens; the character of the decree entered; the scope of the cross-complaint, and many of the facts intended to disclose excusable negligence on her part.

The first error in the record is that in overruling a demurrer to the complaint, and the judgment, for that error, is reversed.

Other questions are made upon subsequent pleadings, but they may not arise after amending the complaint, and we do not pass upon them.

STATE, EX REL. BISHOP, v. CROWE.

[No. 18,487. Filed May 17, 1898.]

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APPEAL AND ERROR.—Record.—Bill of Exceptions.—Motion to Strike Out Part of Pleading.—The question of the correctness of the ruling of the court on a motion to strike out a part of a pleading is not properly presented for review on appeal, where the motion, as incorporated in the bill of exceptions, refers to the matter stricken out as being on certain pages and lines of the original complaint,

State, *ex rel.* Bishop, *v.* Crowe.

and the paging and lines thereof were all changed by being incorporated in the record. *pp.* 457, 458.

OFFICERS.—Removal.—Acceptance of Incompatible Office.—A judgment declaring the office of a township trustee vacant on account of the incumbent thereof having been appointed and having accepted the office of postmaster would not affect the validity of an election of county superintendent participated in by such trustee after the acceptance of such office and before the rendition of the judgment of ouster. *pp.* 459-464.

SAME.—Township Trustee.—Collateral Attack.—Where one has been duly elected to the office of township trustee, inducted into office, and acting as such, his title to such office cannot be questioned in a collateral proceeding. *p.* 462.

QUO WARRANTO.—Officers.—Statute Construed.—Sections 1145, 1146, Burns' R. S. 1894, authorize a suit in the nature of *quo warranto* in the name of the State against one alleged to be unlawfully usurping and intruding into the office of county superintendent belonging of right to relator. *p.* 464.

OFFICERS.—Eligibility.—Pleading.—An allegation in a complaint in a *quo warranto* proceeding to remove defendant from office which alleges that relator was eligible to such office is sufficient without setting out his qualifications as required by the constitution. *p.* 464.

From the Jay Circuit Court. *Reversed.*

John M. Smith and Frank H. Snyder, for appellant.

D. T. Taylor, for appellee.

MCCABE, J.—This was a suit by information in the nature of a *quo warranto*, filed by the relator, John E. Bishop, claiming to be the rightful county superintendent of Jay county, and charging the appellee with usurping and unlawfully intruding into said office, and calling on him to show by what authority he does so. The circuit court sustained appellee's motion to strike out certain portions of the information, and overruled appellant's demurrer to the second paragraph of appellee's answer. The court also sustained appellee's motion to strike out the second paragraph of appellant's reply, and sustained appellee's demurrer to the third and fourth paragraphs of said re-

State, ex rel. Bishop, v. Crowe.

ply. The only error assigned is upon these rulings. On sustaining the demurrer to the third and fourth paragraphs of appellant's reply, he refused to amend or plead further, and judgment was rendered against him on demurrer for want of a reply.

The action of the circuit court upon the motion to strike out certain portions of the information is not so presented by the record as to enable us to determine the correctness of that action. The bill of exceptions by which it is sought to incorporate into the record the portion of the information stricken out, contains the motion, reading as follows: "The said defendant moves the court to strike out and from the plaintiff's amended complaint, all after the word 'meeting' in line 17, page 2, to and including the word 'day,' line 24, page 20, for the following reasons," and then follows a statement of certain reasons for the motion. On turning to page 2, line 17, we find no such word as 'meeting;' and on turning to page 20, we find no such word in line 24 thereof as 'day.' No doubt that was a correct designation of the pages and lines, and the words therein, between which, as it appeared in the original complaint, the language sought to be stricken out would be found. But for us to find the language now, since the paging and lines have all been changed by incorporation into the transcript, would be the merest guess work. Moreover, the language stricken out is not in the record, because it is not in the bill of exceptions. The presumption is that all that appears in the information was left there by the court, unless the contrary is made to appear affirmatively by the record, and the contrary does not so appear. *State, ex rel., v. Halter*, 149 Ind. 292; *Dudley v. Pigg*, 149 Ind. 363, and cases there cited. Besides, we judicially know that the pages and lines referred to in the bill of exceptions are not the pages and lines

State, ex rel. Bishop, v. Crowe.

of the transcript, because at the time the bill of exceptions was made there was no transcript. *Bement v. May*, 135 Ind., at p. 670. The question, therefore, as to the correctness of the ruling on the motion to strike out portions of the information is not presented by the record.

The record is in the same condition as to the action of the court in striking out the second paragraph of appellant's reply. The bill of exceptions does not incorporate or contain any part of it, and as it was all stricken out by the court, it is not in the record, though what purports to be such reply has been copied into the transcript by the clerk. The clerk had no authority to transcribe it into the transcript. The question, therefore, as to whether the court properly struck it out or not, cannot be determined without an examination of the pleading. And that examination cannot be made by us unless such reply is properly incorporated in a bill of exceptions, duly authenticated as a part of the record.

The information shows that there are twelve townships in Jay county, and that pursuant to the statute, section 5900, Burns' R. S. 1894 (4424, R. S. 1881), the township trustees of all the townships met at the auditor's office in said county, on the first Monday of June, 1897, being the 7th day of June, 1897, for the purpose of electing a county superintendent. It names each trustee, giving the name of the township of which he is the trustee, and names P. L. Bishop as the trustee of Bearcreek township in said county. It shows that these trustees, twelve in number, at that meeting balloted for county superintendent 130 times, and that said trustee P. L. Bishop participated throughout said meeting, and voted as a township trustee, for county superintendent, without question of his right so to act. And with his vote there were twelve

State, ex rel. Bishop, v. Crowe.

trustees voting throughout. That no one having received a majority of the votes, but the appellee having received on the last ballot six votes, the meeting adjourned late in the afternoon to meet again at 8 in the evening of said day. At the meeting at 8 o'clock, it is alleged that the six trustees voting for appellee, which number did not include said Bishop, met at the auditor's office again and declared that appellee had received a majority of all the votes cast by trustees legally entitled to vote, and that he was therefore legally elected. And it is alleged that upon this election, so declared, appellee is basing his claim to the office.

The second paragraph of the answer is in confession and attempted avoidance of the information. It admits that there were twelve townships in said county, and that said Peter L. Bishop was duly elected trustee of Bearcreek township, November 6, 1894, and that he gave bond as such, qualified, and entered upon the discharge of the duties of his said office; that afterwards, to wit, on October 9, 1896, the said Peter L. Bishop was duly appointed postmaster by the Postmaster General of the United States for the post-office at the town of Bryant, located in said Bearcreek township, in said county; that he filed his bond to the approval of the proper authority, and took the oath of office as such postmaster, and entered upon the discharge of the duties of such postmaster at said town of Bryant, and thereafter continued to discharge the duties thereto pertaining up to and until August 16, 1897; that by the acceptance of said office of postmaster, said Peter L. Bishop abandoned and impliedly resigned his said office of township trustee of said Bearcreek township, and that the same became then and there vacant, and remained so vacant; that Daniel E. Greiner, the prosecuting attorney, on May 25, 1897, began a suit

State, ex rel. Bishop, v. Crowe.

on his own relation, in the name of the State, in the Jay Circuit Court, by information, against said Peter L. Bishop, to have said office of township trustee declared vacant, for the reason of the acceptance of the office of postmaster, as aforesaid; that afterwards, on June 10, 1897, such proceedings were had on said information that judgment was rendered declaring said office of township trustee of said Bearcreek township vacant, and that the same had been so vacant continuously since from October 9, 1896, when said Bishop accepted the said office of postmaster; that while said action, so commenced by information, was pending in said court, to wit, on June 7, 1897, the township trustees of eleven of the townships, naming them, Bearcreek not being among them, met at the auditor's office of Jay county for the purpose of electing a county superintendent for said county; that said Peter L. Bishop was present at said meeting, and pretended to represent said Bearcreek township as township trustee, but defendant avers that he was not then and there the trustee of said township, and had not been since October 9, 1896, when he accepted said office of postmaster, and he had no legal right to participate in said meeting of said trustees, or to vote for county superintendent, and, hence, there were at said meeting eleven trustees only who were legally entitled to cast a vote then and there for the election of county superintendent. And the answer sets out the names of the eleven trustees, and the name of the township that each represents. The answer further avers that the trustees began voting for county superintendent by ballot, and continued balloting without election until late that night, when an adjournment was had until June 8, 1897; that on said last named day said trustees reconvened and continued voting for county superintendent until they had cast 150

State, ex rel. Bishop, v. Crowe.

ballots; that on the 130th ballot the defendant received the votes of six named trustees, which was a majority of the eleven trustees who were then and there present, having a legal right to vote; and the defendant was thereupon, on motion, duly seconded, declared duly elected as such county superintendent; that on the 8th day of June, 1897, this defendant was, and had been for more than one year before said day, a resident, inhabitant, and qualified voter of Jay county, and eligible to the office of county superintendent. This answer is a complete confession that Peter L. Bishop had been duly elected trustee of Bearcreek township; that he duly qualified and entered into and took possession of the office, and had been engaged in the discharge of its duties ever since, up till the alleged judgment vacating the office, on June 10, 1897, which was after the alleged election of county superintendent, unless appellant's acceptance of the office of postmaster operated to vacate his office of township trustee. The answer, by not denying the allegation in the complaint that Bishop was acting as trustee, and voted as such trustee for county superintendent throughout said meeting of said trustees, admits that he did so act. The judgment alleged to have been rendered vacating the office of township trustee of Bearcreek township, and ousting said Bishop, as already observed, was rendered after the attempted election of county superintendent. And, therefore, that judgment did not affect the validity or legality of that election. In other words, it leaves us to inquire into the validity of that election as if the judgment of ouster had never been rendered. That being so, there is nothing alleged in the answer to support the contention of appellee that there was only eleven votes cast at that meeting, except the allegation that Bishop, after his election as trustee, had accepted

State, *ex rel.* Bishop, v. Crowe.

another lucrative office, namely, postmaster; but it does not allege that the salary of said postmaster exceeded \$90.00 a year. The judgment of ouster in the case mentioned was reversed in this court at this term, because the information failed to allege that such salary exceeded \$90.00 a year, holding that if it did not exceed that sum, as this court presumed it did not, it was not an incompatible office with that of township trustee under the State constitution; and hence its acceptance did not operate to vacate the office of township trustee. *Bishop v. State, ex rel.*, 149 Ind. 223. Therefore, the second paragraph of answer, failing to allege that the salary of the office of postmaster, so accepted by appellant, exceeded \$90.00 a year, failed to show that he had vacated the office of trustee of Bearcreek township by the acceptance of an incompatible office. It results from this, that said answer failed to show that there were only eleven trustees legally entitled to vote at said meeting, and leaves the appellee's claim to the office resting upon the fact that he got six votes out of a total of twelve trustees, and hence, without a majority of the votes of the twelve trustees, and therefore fails to show that he was legally elected.

Besides the answer showing, as it does, that Bishop had been elected and inducted into the office of trustee of Bearcreek township, and was acting as such, at least *de facto*, his title to that office could not be questioned in this collateral way. *Parker v. State, ex rel.*, 133 Ind. 200, 18 L. R. A. 567; *Case v. State, ex rel.*, 69 Ind. 46; *Blackman v. State*, 12 Ind. 556 *Bansemmer v. Mace*, 18 Ind. 27, 81 Am. Dec. 344; *Mowbray v. State, ex rel.*, 88 Ind. 324; *McGee v. State, ex rel.*, 103 Ind. 444, 446-447; *Osborne v. State, ex rel.*, 128 Ind. 129-130; *Re-lender v. State, ex rel.*, 149 Ind. 283, and authorities there cited.

State, *ex rel.* Bishop, *v.* Crowe.

The ruling on the demurrer to the fourth paragraph of the reply presents this feature of the case more distinctly. That reply clearly shows, not only that Bishop had been duly elected and inducted into the office of township trustee, but that he was still in and filling the office, and discharging all and singular the duties which the law requires such a trustee to do or perform at the time of such meeting and attempted election. That he met with said trustees at said meeting, as the trustee of Bearcreek township, and voted for county superintendent throughout the entire balloting therefor.

In *Parker v. State, ex rel., supra*, this court said: "The rule that the acts of an officer *de facto*, performed before ouster, are, as to the public, as valid as the acts of an officer *de jure*, is too familiar to the profession to need the citation of authority. The public is not to suffer because those discharging the functions of an officer may have a defective title, or no title at all." Many of the authorities above, are cited in support of this proposition, among which is *Case v. State, ex rel., supra*. That was a suit upon the bond of a constable by the name of Darius C. Hutchins. The third paragraph of the answer in that case averred, "That said Darius Hutchins, before the alleged breaches of said bond had been committed, and before said writ of execution had been placed in his hands, to wit, on the 4th day of May, 1875, had been elected marshal of the town of Petersburg, in Pike county, State of Indiana, and had accepted said office, and filed his bond with the clerk of said town, as marshal, and had entered into the discharge of the duties thereof, all of which facts were matters of public notoriety, and well known to the justice who placed said writ in the hands of said Hutchins, and said justice had become bondsman for said Hutchins as marshal of the incorporated town of Petersburg, aforesaid, wherefore," etc. The

State, *ex rel.* Bishop, v. Crowe.

trial court sustained a demurrer to said third paragraph of answer, upon which ruling appellant there assigned error. This court said: "We think he was still a constable *de facto*, under color of office, and that his official acts were valid, and that for a breach of his official duty his sureties are liable. His right to the office could not be questioned collaterally; it could be done only in a direct proceeding for that purpose. Until such proceedings were had, and he was ousted of his office, or his term expired, his sureties would remain liable for his misfeasance in office," citing in support thereof two of the cases above cited on this point, and also *Creighton v. Piper*, 14 Ind. 182; *Gumberts v. Adams Express Co.*, 28 Ind. 181. All of the cases cited are to the same effect. Therefore the second paragraph of the answer did not state a defense to the information, and the fourth paragraph of reply was sufficient to avoid the answer if it had ever contained the allegation that the salary of the post-office which said Bishop had accepted exceeded \$90.00 a year.

Cross-error is assigned by appellee upon overruling his demurrer to the information. The first objection to that pleading is that the relator had no right to sue in the name of the State. The statute is express authority to support appellant. Sections 1145, 1146, Burns' R. S. 1894 (1131, 1132, R. S. 1881).

The only other objection worthy of notice is that the information fails to allege that the relator had been an inhabitant of the county during one year next preceding his appointment, a qualification required of all county officers by section 4, article 6, of the constitution. But the information alleged that the appellant was eligible. That was sufficient. *State, ex rel., v. Gorby*, 122 Ind. 17, 28; *State, ex rel., v. Long*, 91 Ind. 351, 354; *State, ex rel., v. Bieler*, 87 Ind. 327; *Reynolds v. State, ex rel.*, 61 Ind. 392, 404; *Relender v. State, supra*.

The Mortgage Trust Company of Pennsylvania v. Moore *et al.*

The circuit court erred in overruling the demurrer to the second paragraph of the answer, and in sustaining the demurrer to the fourth paragraph of the reply. The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the second paragraph of the answer, and overrule the demurrer to the fourth paragraph of the plaintiff's reply, and for further proceedings not inconsistent with this opinion.

THE MORTGAGE TRUST COMPANY OF PENNSYLVANIA
v. MOORE ET AL.

[No. 18,408. Filed April 26, 1898. Motion to modify overruled.
May 17, 1898.]

150	465
157	481
150	465
158	441

WILLS.—Deed.—Delivery.—When Deed and Will Construed Together.

—A father made and acknowledged a deed to his son, but did not deliver it. Afterward the father made a will in which he referred to the deed, stating that he had "conveyed" the land described therein to his son, and directed that the deed be delivered at his death. *Held*, in an action to enforce a provision of the will making a legacy a lien on the real estate, that the deed and will should be construed together. *pp.* 468, 469.

APPEAL.—Evidence.—Objection.—An objection to the evidence for the reason that it is "incompetent, irrelevant, and immaterial," is too general and indefinite to present any available question. *p.* 470.

MORTGAGE.—Mother's Interest as Heir of Daughter.—A father bequeathed to his daughter a legacy and made it a charge upon certain real estate. Before the legacy was paid the daughter died, without children, her mother and her husband surviving her. Subsequently the mother joined the owner of the real estate in a mortgage thereof. *Held*, in an action to foreclose the mortgage, that the mortgage and foreclosure carried the mother's one-fourth interest in the legacy which she inherited from her daughter, under section 2650, Burns' R. S. 1894. *pp.* 470, 471.

DESCENT AND DISTRIBUTION.—Rights of Surviving Husband.—Under section 2650, Burns' R. S. 1894, giving a husband all of his wife's estate if it does not exceed \$1000.00, to entitle the husband to claim

The Mortgage Trust Company of Pennsylvania v. Moore et al.

all the property the burden is on him to show that the amount of the estate does not exceed that sum. p. 472.

PRESUMPTION.—*Wills.*—Presumptions are in favor of intestacy. p. 472.

From the Wabash Circuit Court. *Reversed.*

Dyer B. McConnell and *Edgar B. McConnell*, for appellant.

H. C. Pettit, *T. F. Stitt* and *Royce & Cook*, for appellees.

HACKNEY, J.—This was a suit by Thomas W. Moore against his co-appellees and the appellant, The Mortgage Trust Company, of Pennsylvania, to enforce a lien upon real estate created by the deed and last will of John Makemson.

The sufficiency of the complaint is the first question presented. It alleged that John Makemson, on the third day of July, 1888, his wife joining, made a deed for one hundred acres of land in Kosciusko county to his son, William G. Makemson, said deed containing a condition that the grantee should execute his note to the grantor's wife for a stated sum per annum during her lifetime, if she survived the grantor. It is further alleged that the deed so made was never in any manner delivered to said grantee, but was retained by said grantor until his death, in February, 1889, during which time he remained the owner and continued in possession of said land; that on the 12th day of February, 1889, said John Makemson executed his last will containing, among other provisions, the following:

"Item 8.—I have conveyed to my son, William G., by deed," the land above referred to, "upon certain conditions therein mentioned, which said deed I retain until my death, and at my death to be delivered to him. This is to be in full of his interest in my estate, and he is to pay my daughter, Alice Moore, twen-

The Mortgage Trust Company of Pennsylvania *v.* Moore *et al.*

ty-two hundred dollars, and I charge said land with the payment of said sum."

"Item 10.—I will to my daughter, Alice Moore, the sum of twenty-two hundred dollars, which I have herein directed to be paid to her by my son William.
* * *"

"Item 12.—I expect to pay my daughter, Alice, on the twenty-two hundred dollars, due her from my son William herein provided the principal of the two notes executed to me by Harvey Oram, bearing date August 11th, 1887, each calling for the sum of \$766.66, if I collect the sum during my life time, but in case said notes are not collected during my life, then I bequeath them to my son William at my death, who is to collect said notes and pay the amount collected on the twenty-two hundred dollars, which he is to pay to said Alice as herein directed.

"Item 13.—The lands described herein as being conveyed to my son William and my son Homer by deeds, which said deeds I retain during my life, comprise my old home farm. During my life time I am to receive from said lands full maintenance and support, each of my said sons contributing an equal amount. Beyond this amount my said sons are to receive the rents and profits of said lands as their absolute property. To secure my said support and maintenance I retain said deeds during my life time, at my death said deeds to be delivered to my said sons, each of them being bound, however, to perform the conditions contained in said deeds."

After the death of John Makemson, it was alleged, said deed to William G. was delivered and recorded, and said will was duly probated; that William G. paid to Alice Moore, on the charge in said will against said land, \$1,466.66, but that no other sum was ever paid thereon, although demanded of said William by said

The Mortgage Trust Company of Pennsylvania v. Moore *et al.*

Alice; that said William sold and conveyed said lands to Homer E. Makemson, subject to said charge and lien, said Homer agreeing and undertaking to pay the same. It is alleged also that said Alice had died, leaving said Thomas as her only heir; and that no debts remained against her estate. That he, said Thomas, had demanded from William and from Homer the balance of said charge. Sarah A. Makemson, the mother of said Alice, Homer E. Makemson, and his wife, and the appellant, were made defendants, with a general allegation of an adverse claim which was junior to the plaintiff's claim to said balance.

The objections to the complaint, as stated by counsel for appellant, are, "(1) that it shows on its face that the conveyance was by deed and not by will. (2) It shows no acceptance of the legacy, as a charge upon the land, by William G., of which the Mortgage Trust Co. had notice."

It is argued by appellant's learned counsel that the deed and will, having been executed at different times, should not be construed together; but that the deed should be regarded as having conveyed title to William, and that the testator was powerless, by any act subsequent to the conveyance, to place a charge upon the land. It appears from the allegations of the complaint, and this is admitted by appellant's demurrer, that the deed was only made and acknowledged before the grantor's death, and was, in no way delivered to William. Delivery, as has so often been decided, is an essential part of the execution of a deed of conveyance. There having been no delivery, there was, without the provisions of the will as to delivery, no conveyance, and the unexecuted deed, upon the death of the maker, would have been void, for the want of delivery.

This conclusion, from a consideration of the deed

The Mortgage Trust Company of Pennsylvania v. Moore et al.

apart from the will, would be most disastrous to any claim upon the land by the appellant, whose sole right depends upon William's ownership, and a mortgage by his grantee. The fact that the deed was made prior to the making of the will does not defeat a consideration together of the two instruments. The rule is that where such an intention is manifest, from the reference in a deed to a will, or *vice versa*, the two instruments will be considered and construed together. *Copeland v. Summers*, 138 Ind. 219; *Amos v. Amos*, 117 Ind. 19; Beach on Wills, p. 30; *Estate of Skerretts*, 67 Cal. 585.

Looking to the two instruments and the facts of withholding possession of the deed, and of the land, it is manifest that John Makemson intended to make a disposition, to William, of the property mentioned, to take effect upon his, said John's, death; that he intended also to provide for his daughter, Alice Moore, twenty-two hundred dollars, fifteen hundred and thirty-three dollars of which was to come from Harry Oram, through William, and the remainder from William directly, and that the whole sum was to be a charge upon the land so provided for William. The withholding of the deed, and the provision of the will for its delivery upon the death of John Makemson, together with the rule that a will is effective only upon the death of the testator, brought the two instruments into effect at the same time, the one giving title, and the other prescribing one of the conditions upon which that title passed, namely, of charging the land with the legacy of Alice Moore. The deed would appear, therefore, to be of a testamentary character, and subject to construction in that light. See *Stroup v. Stroup*, 140 Ind. 179, 27 L. R. A. 523. The deed becoming effective by delivery under the will was necessarily taken upon the terms provided in the

The Mortgage Trust Company of Pennsylvania v. Moore et al.

will. The fact that the testator employed the word "conveyed," in his references to the deed to William, is not conclusive that the deed had become effective by a delivery. The allegations of the complaint that the deed was never delivered; that it remained in the testator's possession, and the fact that the will directed its delivery after the testator's death, very clearly disclose that the word was used in a more limited sense than that contended for by the appellant, and that as a consequence, the deed lacked delivery. *Vaughan v. Godman*, 94 Ind. 191.

The complaint, in our opinion, was not subject to demurrer for any of the reasons urged against it.

Upon the motion for a new trial two questions are urged, that the court erred in admitting certain evidence of Barker, a witness for the appellee, and in assessing excessive damages. The objection to the evidence in question as stated in the trial court was "for the reason heretofore given, incompetent, irrelevant and immaterial." The evidence of the witness contained no objection possibly applicable to the evidence in question, and the reasons stated have been held to be too general and indefinite to present any available question.

The cause for a new trial, that the damages were excessive, presents a more serious question. From the evidence and admission of the parties, it appeared that John Makemson died near the 26th day of February, 1889, that being the date of the probate of his will; that his wife survived him; that Alice Moore died on the 22nd day of September, 1890, without children, her husband and her mother, Sarah A. Makemson, surviving her; that about two years after John Makemson died, William G. Makemson conveyed the lands mentioned to Homer E. Makemson, who, about one year thereafter, executed to appellant,

The Mortgage Trust Company of Pennsylvania *v.* Moore *et al.*

a mortgage of said lands, in which mortgage his wife and his mother, the said Sarah A. Makemson, joined; that said mortgage was regularly foreclosed against the said parties thereto, and appellant is now in possession under a deed upon said foreclosure. The complaint alleged the payment, by said William, upon the legacy named, of \$1,466.66; sought to recover the balance thereof and to enforce a lien upon said lands.

The court gave judgment, on March 20, 1897, for \$1,026.00, and the contention is that Sarah A. Makemson, as an heir of her daughter, Mrs. Moore, inherited one-fourth of whatever balance of said legacy remained unpaid at the death of Mrs. Moore, and that the sum adjudged in favor of the appellee, Thomas W. Moore, included the interest so inherited by Mrs. Makemson, which interest, it is claimed, the mortgage and its foreclosure against Mrs. Makemson carried to the appellant. This contention, in our judgment, must prevail. The amount of the judgment is found by deducting \$1,466.66 from the legacy of \$2,200.00, and, after one year from the testator's death and up to the date of the judgment, adding interest at six per cent. per annum. There are various views expressed by counsel as to the time when interest began to run, but even if from the date of the testator's death, the judgment would be excessive, and, from the appellee's position, that interest began to run when the estate should have been settled, the judgment was excessive by about \$260.00. It is said, however, that at the death of Alice Moore the claim was less than one thousand dollars, upon any reasonable theory as to interest, and that under the statute, section 2650, Burns' R. S. 1894, the whole of said sum would go to the appellee as her heir. That section provides that upon the death of the wife, leaving no child, but leaving her husband and her mother, the husband shall take

 Davis et al. v. Schlemmer, Administrator.

three-fourths, and the mother one-fourth of the wife's estate, "Provided, That if the whole amount of property real and personal, do not exceed one thousand dollars, the whole shall go to such * * * widower." To entitle the appellee to the whole of the estate of his deceased wife, it was incumbent upon him to show that the estate was of the character of that named in the proviso quoted. This obligation was not discharged. Not a word of evidence as to the property left by Mrs. Moore is in the record. It is urged by the appellee that as no evidence was offered in support of the plea of payment, the allegation of the complaint that \$1,466.66 had been paid could not be considered, and the judgment would be for much less than three-fourths of the legacy. This, upon the theory of the complaint, as we have stated it, cannot be. Nor does the fact that Mrs. Makemson filed in this case a disclaimer, add to the appellee's claims against the appellant. Her interest was covered by the mortgage and its foreclosure. Nor is there any presumption that Alice Moore died testate, leaving to her husband the interest which otherwise would go to her mother. Presumptions are not in favor of testacy, but are in favor of intestacy. The judgment is reversed, with instructions to sustain the motion for a new trial.

 DAVIS ET AL. v. SCHLEMMER, ADMINISTRATOR.

[No. 18,492. Filed May 18, 1898.]

SUBROGATION.—*Not Founded Upon Contract.*—The right of subrogation is not founded upon contract, express or implied, but upon principles of equity and justice. *p. 478.*

SAME.—*Replevin Bail.*—*Special Findings.*—*Injunction.*—Defendant became replevin bail for stay of execution of a judgment at the request of one not a party, but interested in the payment of the judgment, and was compelled by the judgment creditor to pay same; the judgment defendant brought suit to enjoin replevin bail

 150 472
 150 498

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 163 608

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Davis *et al.* v. Schlemmer, Administrator.

from collecting the judgment, and for the cancelation thereof. *Held*, that the court erred in rendering judgment granting such relief, where the special findings on which the judgment was rendered did not show that the protection of the property and interests of replevin bail or that of the person who procured such stay of execution did not require the payment thereof. *pp.* 473-482.

From the Montgomery Circuit Court. *Reversed.*

B. Crane and *A. B. Anderson*, for appellants.

E. C. Snyder, for appellee.

MONKS, J.—This action was brought by one Nicholas Schendorf against appellants to have a certain judgment adjudged satisfied, and to enjoin the collection thereof by execution. After the commencement of the action said Schendorf died, and appellee was duly appointed administrator of his estate, and, by order of court, substituted as a plaintiff.

It appears from the special finding of facts that the appellant, John Hitch, on March 9, 1894, recovered a judgment against appellee's decedent and one Margaretta Lutz for two hundred and seventy-seven and 75-100 dollars, and that on April 14, 1894, one Stephen Allen having become interested in the payment of said judgment, he procured the appellant, Caleb Davis, to become replevin bail for the stay of execution on said judgment, which stay of execution was executed and attested in all respects as required by the statute. Afterwards, on September 8, 1894, said John Hitch caused an execution to be issued on said judgment to the sheriff of Montgomery county, against the judgment defendants and said replevin bail, Caleb Davis, and said Davis was compelled to and did pay to said sheriff the full amount of said judgment, principal and interest and costs, which said sheriff indorsed on said execution as a payment thereof in full. The sheriff on the same day paid to John Hitch the full amount of the principal and interest due upon said judgment,

Davis *et al.* v. Schlemmer, Administrator.

and at the same time said Hitch assigned said judgment to said Caleb Davis, as required by section 612, Burns' R. S. 1894 (603, Horner's R. S. 1897), except that the same was not attested by the clerk. Afterward, said appellant, Caleb Davis, caused an execution to be issued on said judgment "for the use and benefit of Caleb Davis, assignee of said judgment." This is the execution sought to be enjoined in this action. Neither of the judgment defendants procured or requested said Caleb Davis to become replevin bail on said judgment, nor to pay the same after the first execution had been issued thereon.

Upon these facts the court stated as a conclusion of law that appellee was entitled to a decree that said judgment was fully paid and satisfied, and enjoining the appellants from levying said execution upon the property of appellee's decedent.

Section 702, Burns' R. S. 1894 (710, Thornton's R. S. 1897), provides that a person against whom a judgment has been rendered may have stay of execution "by procuring one or more freehold sureties to enter into a recognizance, or acknowledging themselves bail for the defendant for the payment of the judgment," etc.

The legal effect of the entry of replevin bail is that of a judgment confessed. Section 709, Burns' R. S. 1894 (717, Thornton's R. S. 1897); *Reissner v. Dessar*, 80 Ind. 307, 314; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Baker v. Merriam*, 97 Ind. 539.

Section 1228, Burns' R. S. 1894 (1237, Thornton's R. S. 1897), provides that when any replevin bail shall be compelled to pay any judgment, or any part thereof, the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail making such payment, and after the plaintiff is paid, so much of the judgment as remains

Davis *et al.* v. Schlemmer, Administrator.

unsatisfied may be prosecuted to execution for his use. Under the provisions of said section, when a replevin bail pays the judgment, the same is not thereby satisfied, but when the record shows such payment by him, he is entitled to an execution thereon, the same as a judgment plaintiff, without any order of court therefor. *Dessar v. King*, 110 Ind. 69; *Reissner v. Dessar*, *supra*, p. 314; *Wilson v. Murray*, 90 Ind. 477.

Even without said section, the payment of a judgment by a replevin bail would not satisfy the same, but such judgment would be kept alive in equity, and the replevin bail would be entitled to be subrogated to all the rights of the judgment plaintiff, and could by a proper suit, obtain an order of court for execution, to his use on said judgment, against the judgment defendants. *Vert v. Voss*, 74 Ind. 565, 569; *Gerber v. Sharp*, 72 Ind. 553; *Pence v. Armstrong*, 95 Ind. 191, 196; *Armstrong v. Farmers Nat'l Bank*, 130 Ind. 508, 511; 2 Brandt on Suretyship and Guaranty, section 298; Sheldon on Subrogation, section 1 on p. 2, and section 93 on p. 107. Said statute, therefore, merely re-enacts the equitable rule of subrogation in regard to the effect of payment of judgments by replevin bail, and the other sureties named. The only right given to a replevin bail that did not already exist in equity was to have an execution on such judgment without an order of court or an assignment of the judgment by the owner thereof to such replevin bail.

It is insisted by appellee that such undertaking of bail for the stay of execution is a contract, and that as the judgment defendants did not procure or request the appellant, Caleb Davis, to become replevin bail, no contractual relation was created between the judgment defendants and appellant Davis, and he acquired no rights, as against them, by so becoming replevin bail, and paying said judgment. That Allen,

Davis et al. v. Schlemmer, Administrator.

a stranger to the judgment, having procured him to become replevin bail without authority from the judgment defendants, the execution of such undertaking did not create the relation of principals and surety between said judgment defendants and the replevin bail; that as to them he was a mere volunteer, and could not recover for money paid to their use, because the same was not paid at their request, either express or implied. It is not the law, as insisted by appellant, that a replevin bail cannot collect by execution a judgment which he has paid unless procured to become such by the judgment defendants. It is true, however, that a mere stranger or volunteer who pays a debt cannot recover therefor against the person whose debt is thus paid, nor can he be subrogated to the rights of the creditor to whom the debt is paid. *Reeves, Admr., v. Isenhour*, 59 Ind. 478; *Shirts v. Irons*, 28 Ind. 458; *Woodford v. Leavenworth*, 14 Ind. 311, 313; *Chrisman v. Long*, 1 Ind. 212; *McClure v. Andrews*, 68 Ind. 97; *Nash v. Taylor*, 83 Ind. 347; *Binford, Admr., v. Adams, Admr.*, 104 Ind. 41; 24 Am. and Eng. Ency. of Law, 281-284; Harris' Law of Subrogation, sections 793, 794; Sheldon on Subrogation, sections 3, 186.

It is said in Sheldon on Subrogation, section 186, "The voluntary payment of the note made by one who is not bound for it and had no interest in discharging it affords no ground for subrogation. But if a stranger has made such a payment without previous authority from the debtor, and before any ratification of the payment by the debtor the creditor and the stranger undo the transaction, and the creditor returns the money to the stranger, it is then too late for the debtor to ratify the payment, and the creditor can enforce the original obligation against him. *Walter v. James*, L. R. 6 Exch. 124; *Mechanics' Bank v. Seitz*, 30 W. N.

Davis et al. v. Schlemmer, Administrator.

Cas. 261. Such a payment made by a stranger becomes an efficacious payment only when it is ratified or adopted by the debtor. *Edgeworth Co. v. Wetherbee*, 72 Mass. 166; *Simpson v. Eggington*, 10 Exch. 845; *Jones v. Broadhurst*, 9 C. B. 193, 67 E. C. L. R. 193; *Belshaw v. Bush*, 11 C. B. 191, 73 E. C. L. R. 191; *Martin v. Quinn*, 37 Cal. 55; *Dodge v. Freedman's Savings Co.*, 93 U. S. 379. See, also, 1 Beach on Modern Law of Contracts, sections 366, 369, and cases cited. *Orumlish, Admr., v. Central Impr. Co.*, 38 W. Va. 390, 23 L. R. A. 120, and note, pp. 120-132, 18 S. E. 456, 45 Am. St. 872.

But one who may be compelled to pay a debt, or the protection of whose property or interest demands that he pay it, is not a stranger or mere volunteer. *Binford Admr., v. Adams, Admr., supra*, on p. 42; *Sidener v. Pavey*, 77 Ind. 241; *Rardin v. Walpole*, 38 Ind. 146; *Bunting v. Gilmore*, 124 Ind. 113, 119; *Chaplin v. Sullivan*, 128 Ind. 50, 54; *Backer v. Pyne*, 130 Ind. 288, 292; *Heritage v. Paine*, 2 Ch. Div. 594; *Farmers Bank v. Erie R. R. Co.*, 72 N. Y. 188; *Cole v. Malcolm*, 66 N. Y. 363; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Jacques v. Fackney*, 64 Ill. 87; *Cheesebrough v. Millard*, 1 John Ch. (N. Y.) 409, 7 Am. Dec. 594; *Mossier's Appeal*, 56 Pa. St. 70, 93 Am. Dec. 783; *Hoover v. Epler*, 52 Pa. St. 522; *Cottrell's Appeal*, 23 Pa. St. 294; *Ketchner v. Forney*, 29 Pa. St. 47; *Wallace's Appeal*, 5 Pa. St. 103; *Greiner's Estate*, 2 Watts. (Pa.) 414; *Payne v. Hathaway*, 3 Vt. 212; 24 Am. and Eng. Ency. of Law, 281, 285-290; Sheldon on Subrogation, section 245; Harris' Law of Subrogation, section 795.

If a person becomes replevin bail without the procurement of the judgment defendants, under such circumstances that when he pays the judgment he would be entitled in equity to subrogation to the rights of the

Davis et al. v. Schlemmer, Administrator.

owner of the judgment, he is clearly entitled to collect such judgment by execution under the statute.

The right of subrogation is not founded upon contract, express or implied, but upon principles of equity and justice, and is broad enough to include every instance in which one party, not a mere volunteer, pays a debt for another, primarily liable, and which in good conscience and equity should have been paid by the latter. *Spaulding v. Harvey*, 129 Ind. 106, 109, 13 L. R. A. 619, 28 Am. St. 176; *Huffmond v. Bence*, 128 Ind. 131, 137; *Sidener v. Pavey*, *supra*; *Gerber v. Sharp*, 72 Ind. 553, 556-558; *Rooker v. Benson*, 83 Ind. 250, 256; *Kyner v. Kyner*, 6 Watts. (Pa.) 221; *Harnsberger v. Yancey*, 33 Gratt. (Va.) 527; *Miller v. Winchell*, 70 N. Y. 437; *Mathews v. Aiken*, 1 N. Y. 595; *Lewis v. Palmer*, 28 N. Y. 271; *Stevens v. Goodenough*, 26 Vt. 676; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Darst v. Thomas*, 87 Ill. 222; *Greenwill v. Heritage*, 71 Mo. 459; *Redington v. Cornwell*, 90 Cal. 49, 27 Pac. 40; Sheldon on Subrogation, sections 1, 11.

In *Huffmond v. Bence*, *supra*, p. 137, this court said: "In *Rooker v. Benson*, 83 Ind. 250, it was held that subrogation does not depend on privity or strict suretyship. It is the mode in which equity compels the ultimate discharge of a debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could compel to pay it."

In *Reissner v. Dessar*, *supra*, a judgment was rendered against four persons, one of whom, named Joseph R. Dessar, was surety, but this fact was not shown by the judgment; Rich, one of the judgment defendants, procured one King to become replevin bail for the stay of execution on said judgment. Afterwards, King, the replevin bail, paid said judgment, interest and cost, and caused an execution to issue thereon. Dessar sued to enjoin the collection of said

execution by sale of his property. This court held that whether King at the time he replevied the judgment did or did not know that Dessar was surety, it was certain that by his replevying it he did not release Dessar from his liability to pay the judgment, but that the owner of the judgment had a right to collect it from Dessar, notwithstanding King had replevied it, and that it was his duty to exhaust the property of said Dessar before levying upon the property of King, the replevin bail, and that when King paid off the judgment, Dessar could not claim that it was a voluntary payment by a stranger. This court said: "This is not a suit by King to collect money paid for the use and benefit of Dessar, but it is a suit to enforce a statutory remedy to compel Dessar, by execution, to pay a judgment against him and others, which has never been discharged, and for the payment of which he is still liable. King does not come into this case as a volunteer or stranger; he is replevin bail, a party to the record, has been compelled to pay the money, and our statute gives him the right to have this execution. * * * When King replevied the judgment he did so for the benefit of all the judgment defendants, and when he paid the amount to the execution plaintiff, it was a compulsory payment, and he had a right to his statutory remedy of a new execution against each and all of the judgment defendants." The doctrine declared in said case was approved on the second appeal thereof. *Dessar v. King, supra.*

It is clear that a replevin bail may collect by execution a judgment paid by him as such replevin bail in cases when he could not recover a judgment against the judgment defendants in an action for money paid for their use. The rights of appellee, therefore, in this action, do not depend upon his right to collect from the judgment defendants by action the amount paid by him on said judgment.

Davis et al. v. Schlemmer, Administrator.

If the protection of the property or interests of Stephen Allen required that he pay said judgment, and he did so pay it, without any request from the judgment defendants, or if without any request from such judgment defendants he became replevin bail on said judgment and paid the same, under the doctrine declared in the authorities cited, he would be entitled to be subrogated to all the rights of the owner of such judgment, even if he could not recover a personal judgment against said judgment defendants for money paid out to their use. And if, instead of himself paying said judgment, or becoming replevin bail, he procured appellant to become such replevin bail, appellant, under the authorities cited, would be entitled to such subrogation, independent of the statutes authorizing execution to his use, and, under such statutes, he would be entitled to collect said judgment by execution.

The facts stated in the special finding do not show that the protection of the property and interest of Stephen Allen did not require him to pay said judgment, neither do they show that the protection of the property and interest of appellant did not require that he pay said judgment.

It is said in 2 Brandt on Suretyship and Guaranty, section 298, that "A surety who becomes such at the request of the creditor, and without any request from the principal, is, if he pay the debt, entitled to subrogation. The right of the surety to demand of the creditor whose debt he has paid, the securities he holds against the principal debtor, and to stand in his shoes, does not depend at all upon any request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the surety and the creditor, and is founded, not upon any contract, express or implied, but springs from the most obvious

principles of natural justice.' *Mathews v. Aiken*, 1 N. Y. 595."

It would seem, therefore, that if the appellant had become replevin bail at the request of the owner of the judgment, or anyone interested in the payment thereof, that upon payment of the judgment he would be entitled to subrogation to the rights of the owner of said judgment in equity, and, under the statute, to collect the same by execution.

If a person becomes replevin bail under an agreement by which he assumes and agrees to pay the judgment, and the same thereby becomes his own debt, or if he becomes replevin bail at the request of one not a party to said judgment who has made an agreement by which the same becomes his debt, in such case, when such replevin bail pays the judgment, it would seem that he would not be subrogated to the rights of the owner of said judgment, but that such payment would be a satisfaction thereof.

On the other hand, if appellant was a stranger, a mere volunteer, as insisted by appellee, it is necessary to determine whether the transaction in which appellant paid the money was intended by him and the owner of the judgment as a satisfaction thereof, and this is a question of fact. *Binford, Admr., v. Adams*, *supra*, pp. 43-46, and cases cited. In determining this question, the assignment of the judgment to appellant is to be considered. It has been held that where a person takes up a claim for which another is liable, and to which he is a stranger, the transaction will be deemed a purchase and not a payment, if such was the intention of the parties, and this will be the rule, whatever the method of accomplishing the result may have been. *Swope v. Leffingwell*, 72 Mo. 348; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Dodge v. Freedman's Savings & Trust Co.*, *supra*; 1 Beach on Contracts, section 164.

Davis *et al.* v. Schlemmer, Administrator.

It was held in *Bishop v. Rowe*, 71 Me. 263, that when a third person, a stranger to a note, has given his obligation in writing, in consideration of the discounting of such note, that he will "be holden the same as if he had indorsed the note," that upon payment thereof in pursuance with such obligation he is entitled to the note undischarged, and to maintain an action on the same in his own name. The court said in that case: "He [the person who paid the note] was then no party to the note, nor did he pay it at the request of, or for the benefit of those whose duty it was to pay it. He was a stranger to the note and paid it for no reason except his obligation to the bank, and in pursuance to the writing he had given. * * * The bank was the owner of the note which was payable to bearer and therefore had the same right to sell the note as to discharge it, upon payment by a stranger. * * * Hence, the effect of the payment to the bank depending upon the intention of the parties to it, we are necessarily brought to the conclusion that their purpose was to preserve the note and not to discharge it."

The judgment defendants have never paid said judgment, or any part of it, and the only ground upon which it is sought to enjoin the collection thereof is that the same was satisfied because paid by a mere volunteer.

It follows, from what we have said, and the authorities cited, that the court erred in its conclusion of law.

The facts found are such that we think justice requires that a new trial be granted. The judgment is reversed, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Heal et al. v. The Niagara Oil Company et al.

HEAL ET AL. v. THE NIAGARA OIL COMPANY ET AL.

[No. 18,564. Filed May 18, 1898.]

JUDGMENT.—*Modification.*—*Review.*—Where there was no objection to the form of a decree, and no motion or other steps taken to modify it, no question thereon is presented for review on appeal. *p. 483.*
 LANDLORD AND TENANT.—*Lease by Married Woman.*—*Natural Gas and Oil Lease.*—A lease by a married woman of her lands to a gas and oil company for the purpose of operating thereon gas and oil wells is not an encumbrance or conveyance thereof within the meaning of section 6961, Burns' R. S. 1894, prohibiting a married woman from encumbering or conveying her lands without her husband joining in the execution thereof. *pp. 484-487.*

From the Wells Circuit Court. *Affirmed.*

Levi Mock, John Mock, George Mock and P. B. Manley, for appellants.

Joseph S. Dailey, Abram Simmons and Frank C. Dailey, for appellees.

HACKNEY, J.—The appellants sued to enjoin the appellees from operating or attempting to operate for oil or gas upon six several tracts of land. The trial court, by general decree, denied the injunction. Upon the trial appellees expressly disclaimed any interest in four of such tracts, and insisted only upon their right to operate upon two of the tracts, that known as the Schultz land, and that known as the Swan land.

One insistence of appellants is that the decree was wrong as to the four tracts other than those of Schultz and Swan. There was no objection to the form or scope of the decree, and no motion or other step was taken to correct or modify it. There is, therefore, no question properly presented for review upon this branch of the case. *Berkey, etc., Co. v. Hascall*, 123 Ind. 502, 8 L. R. A. 65; *Wood v. Hughes*, 138 Ind. 179; *Tewksbury v. Howard*, 138 Ind. 103; *Chicago, etc., R. W. Co. v. Eggers*, 147 Ind. 299.

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Heal et al. v. The Niagara Oil Company et al.

We do not understand, as appellants' counsel do, that appellees contend against the right to raise any question because of the failure to move for a modification of the decree:

The rights in dispute, as to the two tracts specially named, depend upon leases, by the owners to the parties, appellants and appellees, respectively.

The lease by Rosa L. Swan to the appellees bears date April 27, 1893, was for one year from May 17, 1893, with the following condition:

"If no well be completed * * * within six months from the date hereof, then this lease shall become null and void unless the lessee shall thereafter pay for further delay at the rate of eighty dollars per year, until a well shall be completed." At the time of the execution of the lease, Mrs. Swan was a married woman, and her husband did not join. Afterwards, on November 4, 1894, Mrs. Swan, then a widow, received from the appellees eighty dollars "for rental on the lease," with a stipulation in the receipt that "This renews to November 17, 1895." On the first day of August, 1895, Mrs. Swan executed to the appellants a similar lease of the same lands so leased to the appellees, the appellants at the time having actual and constructive knowledge of the lease to the appellees, and actual knowledge of the payment of said sum to Mrs. Swan by the appellees upon the lease, and accepting this lease, and paying a consideration therefor, with the understanding that if the appellees' lease should not prove invalid, said consideration should be repaid.

There is much controversy as to whether the appellees were guilty of such failure to operate for gas or oil as had created a forfeiture of the lease at the time appellants' lease was executed, and authorities are cited as to the construction and character of such

Heal et al. v. The Niagara Oil Company et al.

leases with reference to an early and continued prosecution of the work of discovery, but, it seems to us, there is no rule which forbids the parties contracting as to such delays as they may desire, and, aside from the power of Mrs. Swan to contract at all, there is no doubt, upon the face of the transaction, that they contracted for delay until November 17, 1895. Appellants insist; however, that the lease by Mrs. Swan alone to the appellees was void, and that the subsequent receipt of the rental did not ratify the lease. Opposing this view, appellees assert the single proposition that appellants may not assert the coverture of Mrs. Swan to defeat the first lease, and they cite *Bennett v. Mattingly*, 110 Ind. 197; *Johnson v. Jouchert*, 124 Ind. 105, 8 L. R. A. 795, and *Plaut v. Storey*, 131 Ind. 46. These cases hold that as to contracts voidable on account of coverture, parties in privity of estate merely may not assert such coverture, but that such privilege may only be exercised by persons in privity of blood or representation.

In the cases of *Bennett v. Mattingly* and *Johnson v. Jouchert*, it was held that as to void contracts a different rule applies. Here, it is urged by appellants, the lease was void by reason of the absolute denial of power to a married woman "to encumber or convey" her lands "except by deed in which her husband shall join." Section 6961, Burns' R. S. 1894 (5116, Horner's R. S. 1897); *Luntz v. Greve*, 102 Ind. 173; *Kinman v. Pylé*, 44 Ind. 275.

Does the lease in question fall within this express denial of power? The ordinary lease of agricultural lands, for the purpose of cultivation, although carrying an interest in the lands, has been held not to fall within the inhibition of the statute cited. *Pearcy v. Henley*, 82 Ind. 129; *Nash v. Berkmeir*, 83 Ind. 536. See, also, *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

Heal et al. v. The Niagara Oil Company et al.

In the first of these cases it was said: "The lands of a married woman, and the rents and profits therefrom, are her separate property as fully as if she were unmarried. To realize rents, lands must be let; and it seems to us that a lease for a term not exceeding three years is not an encumbrance or conveyance within the meaning of the act touching the marriage relation, construed in connection with the other statutes above noticed. When the legislature provided that a married woman should have no power to encumber or convey her lands, except by deed, in which her husband should join, they did not intend to make a written lease necessary which would not be necessary in other cases."

In *Nash v. Berkmeir*, *supra*, it was held that the joining of the husband in a lease of the wife's land was not essential to the validity of the lease. It was held, also, on the authority of *Sanborn v. French*, 2 Foster 246, that a lease in which the husband did not join, unlike a deed of conveyance, may be confirmed after the husband's death. See, also, *Elliott v. Gower*, 12 R. I. 79, 34 Am. Rep. 600; *McKesson v. Stanton*, 50 Wis. 297, 36 Am. Rep. 850, 6 N. W. 881; *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817; *Williams v. Urmston*, 35 Ohio St. 296, 35 Am. Rep. 611.

Leases of the character of the present differ from the ordinary agricultural lease, in that the former may carry a substantial and enduring interest in the freehold, while the latter vests but a transient and temporary interest, that of raising and removing crops. The former, however, in their primary effect, part with no immediate title or estate, and carry but right of exploration, any title or estate which may be contemplated remaining inchoate and of no effect until the oil or gas is found. *Venture Oil Co. v. Fretts*, 152 Pa. St. 451, 25 Atl. 732. For the purpose of pros-

Heal et al. v. The Niagara Oil Company et al.

pecting, such leases involve a mere use, and part with no greater interest in the freehold than the ordinary agricultural lease. We have here no question of the effect of the instrument of Mrs. Swan to carry a freehold estate, the question being as to the validity of the lease to the appellees in vesting the exclusive right of prospecting or operating for gas and oil. For such purpose we do not doubt the power of Mrs. Swan to lease without her husband joining.

The facts as to the lease by Mrs. Swan to the appellees, the payment of the rental, according to the evidence the most favorable view for the appellees, the knowledge of appellees' lease and such payment, may all be said to be true as to the leases by Schultz and wife. The extension of this lease is even more clear than as to the former, as the parties met and agreed upon the location for a well but a few days before the lease to the appellants.

We do not consider the question as to how the equities of the appellants may be affected, when appealing to a court of equity, by the fact of having taken leases with a full knowledge of outstanding leases, executed in good faith, and upon a valuable consideration, and in the taking of which litigation was contemplated without restoring the consideration paid for the first leases or their extension.

Other merely incidental questions have been discussed, but as they are necessarily involved in the questions decided, or depend upon the weight of the evidence, we do not pass upon them. The judgment is affirmed.

Watson et al. v. Tindall et al.

WATSON ET AL. v. TINDALL ET AL.

[No. 18,882. Filed May 19, 1898.]

PLEADING.—Overruling a Demurrer.—Harmless Error.—The overruling of a demurrer to a bad answer is harmless where there was a special finding of facts by the court, and the facts found could have been proved as well under another paragraph of plaintiff's answer.

From the Harrison Circuit Court. *Affirmed.*

E. D. Mitchel and *J. K. Marsh*, for appellants.

George W. Self, *William Ridley* and *Henry Richard*, for appellees.

HOWARD, C. J.—This was an action by appellants to recover undivided interests claimed by them in certain real estate held by appellees. The appellees answered by general denial, and also by special paragraph, to the latter of which a demurrer was overruled. There was a special finding of facts, with conclusions of law that appellants were not entitled to any interest in the land in dispute.

Much of the briefs of counsel is taken up with a discussion of the sufficiency of the special paragraph of answer. We do not find that any of the objections urged to this pleading are well taken; besides, even if the answer were not good, the ruling would still be harmless. The facts found specially entitled the appellees to judgment in accordance with the conclusions of law; and these facts could be proved under the general denial quite as well as under the special paragraph of answer. See *Walling v. Burgess*, 122 Ind. 299, 7 L. R. A. 481; section 1067, R. S. 1894 (1055, R. S. 1881).

The appellants and the appellee Annie M. Tindall are the heirs at law of one Ella Watson, deceased. The facts found show that, in 1884, for good consideration, the said Ella Watson, then owner of the land

Warford *et al.* v. Hankins.

in controversy, conveyed the same to said appellee, Annie M. Tindall, by warranty deed; and that the consideration agreed upon has been fully paid by said appellee. The evidence is not in the record, and no good reason is shown why the conclusion reached by the court should not be sustained. Judgment affirmed.

WARFORD ET AL. v. HANKINS.

[No. 18,493. Filed May 19, 1898.]

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VENDOR'S LIEN.—*When Reserved in Deed.*—*Mortgage.*—*Subrogation.*
—For the purposes of subrogation there is no difference between a vendor's lien expressly reserved in the deed and a mortgage given by the vendor to secure the purchase money. pp. 492, 493.

SUBROGATION.—*Right of Not Founded Upon Contract.*—*Equity.*—The right of subrogation is not founded upon contract, express or implied, but upon principles of equity and justice, and includes every instance in which one party, not a mere volunteer, pays a debt for another, primarily liable, and which in good conscience should have been paid by the latter. p. 493.

VENDOR'S LIEN.—*Reservation of in Deed.*—*Notice.*—A lien reserved in a deed conveying real estate is notice to a subsequent mortgagee of the rights of those claiming under such lien. p. 496.

MORTGAGE.—*To Secure Preexisting Debt.*—A mortgage given to secure a preexisting debt will not cut off prior equities. p. 496.

SUBROGATION.—*Vendor's Lien.*—Where a third party pays a note secured by a vendor's lien, under an agreement with the makers that he is to hold the note with the lien as security, the person so paying the note will be subrogated to the rights of the vendor, as against a subsequent mortgagee. pp. 495–497.

From the Posey Circuit Court. *Affirmed.*

Alexander Gilchrist and Curran A. DeBruler, for appellants.

J. W. Henson and Garvin & Cunningham, for appellee.

MONKS, J.—Appellee brought this action against appellants on a note given for the unpaid purchase money of real estate, and to foreclose the lien on said real estate reserved in the deed conveying the same.

Warford et al. v. Hankins.

The only error assigned, and not waived, is that the court erred in its conclusions of law.

The part of the special finding necessary to the determination of the question presented is substantially as follows: On December 13, 1888, one Cosby conveyed to David J. Mackey and Edward T. Sullivan certain real estate in Posey county, Indiana, for the sum of \$6,500.00. In the deed a lien was reserved to secure the notes given for the unpaid purchase money. Mackey and Sullivan were partners, engaged in buying land, and farming the same, in Posey county. Sullivan was the managing partner, Mackey being engaged in other enterprises. All the notes so given were paid off by Mackey and Sullivan, except the last one for \$1,000.00, which fell due March 1, 1892. After this note became due it was placed in a bank at Evansville for collection, and on August 27, 1892, the firm not having the money to pay the same, said Sullivan paid the interest on said note to said date, and, on behalf of said firm of Mackey and Sullivan, applied to appellee for a loan of \$1,000.00 to take up said note, agreeing that appellee should hold said note uncanceled, and should have and hold the lien to secure the payment of said note that was held by said Cosby, and that appellee in consideration of said promise and agreement gave said Sullivan a draft on a bank at Mt. Vernon, Indiana, for the sum of \$1,000.00, payable to the firm of Mackey and Sullivan, which draft was, on the same day, August 27, 1892, indorsed in the firm name of Mackey and Sullivan to the bank in Evansville holding said note for collection, and the note taken up by said Sullivan with the funds of appellee, and for her use, was on the same day delivered to appellee under said agreement. Before delivering said note to appellee the following was entered on the back of said note: "This note was taken up for Mackey

Warford et al. v. Hankins.

and Sullivan by Olive L. Hankins, August 27, 1892. Mackey and Sullivan paid the interest in full to said date, and we agree to pay said Hankins seven per cent. per annum interest until paid, interest payable semiannually, on her \$1,000.00. Mackey and Sullivan, per E. L. Sullivan."

Cosby, the payee of said note, was not a party to said agreement, Mackey was not present and knew nothing of the transaction, and Sullivan had no authority to make the same, except such as he had as the managing partner of the business of said firm, and the real estate for which the note was given was the property of the firm. On November 16, 1893, Mackey and Sullivan being largely involved and in failing circumstances, executed to appellant Huston a mortgage on the real estate described, for which said note was given, and on other lands in Posey county, two of which were payable to William P. Warford to secure certain notes and to save said Huston harmless by reason of his being security thereon. The notes mentioned in said mortgage were all dated in June and July, 1893. At the time of the execution of said mortgage to Huston on November 16, 1893, neither he nor Warford had any notice of any lien on said real estate, except that given by the record of the deed from Cosby to Mackey & Sullivan, and they had no actual knowledge that appellee held said note, or that the lien in favor of Cosby on said real estate had been transferred to her, and that said note is due and unpaid.

The conclusions of law stated by the court were, in substance, that Sullivan, the managing partner of the firm of Mackey & Sullivan, had the legal right to make the contract referred to with appellee, without first procuring the consent of his co-partner, Mackey; that the oral agreement of Sullivan on behalf of said firm

Warford et al. v. Hankins.

was a valid and binding agreement, and had the effect to transfer said note together with the lien securing the same to appellee; that the appellants Warford and Huston took their mortgage charged with notice of the prior lien upon said real estate, to the extent of the unpaid note described in said deed; that appellee's lien was prior and superior to that of appellants' for the amount of the face of the note, with six per cent. interest thereon, that being the rate of interest provided in the note. Judgment was rendered accordingly.

Appellants insist that the note and the lien securing the same could not be transferred to appellee without the payee was a party to the agreement, and that under the facts found the note was paid and the lien securing the same was thereby satisfied; that appellee's only relief is limited to a recovery against Mackey and Sullivan. Appellee contends that as she took up said note on agreement with the makers of the note that said note and the lien securing the same should be held by her as security therefor, she is subrogated to all the rights of Cosby, provided that the rights of innocent third parties have not intervened.

A vendor's lien upon real estate for the unpaid purchase money is created by implication of law, but when a lien for the purchase money is expressly reserved by a vendor in his deed of conveyance a lien is created by contract, and not by implication of law. It is a contract that the land shall be subject to a lien until the purchase money is paid, and is really a mortgage. *Bever v. Bever*, 144 Ind. 157, 162, 163, and authorities cited; *Sample v. Cochran*, 84 Ind. 594; Jones on Mortgs., sections 228, 229; 28 Am. and Eng. Ency. of Law, 184, 193; 3 Pom. Eq. Jur., sections 1257, 1258.

For the purposes of subrogation there is no difference between a vendor's lien expressly reserved in the

deed, and a mortgage given by the vendee to secure the purchase money. *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. 88, 6 S. W. 897; 28 Am. and Eng. Ency. of Law, 192. The right of subrogation is not founded upon contract, express or implied, but upon principles of equity and justice, and includes every instance in which one party, not a mere volunteer, pays a debt for another, primarily liable, and which in good conscience should have been paid by the latter. *Davis v. Schlemmer, Admr., ante*, 472, and cases cited.

A person who may be compelled to pay a debt, or the protection of whose property or interest requires that he pay it, is not a mere volunteer. *Davis v. Schlemmer, supra*, and cases cited. Nor is one who pays a debt or advances money for the purpose, at the request of the debtor, a mere volunteer. *Shattuck v. Cox*, 128 Ind. 293; *Reeves, Admr., v. Isenhour*, 59 Ind. 478; *Shirts v. Irons*, 28 Ind. 458, 461; *Woodford v. Leavenworth*, 14 Ind. 311, 313; *Tribble v. Nichols*, 53 Ark. 271, 13 S. W. 796, 22 Am. St. 190; *Gans v. Thieme*, 93 N. Y. 225; 24 Am. and Eng. Ency. of Law, 281, 294, 296; 2 Ency. of Plead. and Prac., 1012; 3 Pomeroy Eq. Jr., section 1212; Harris on Subrogation, section 792.

In 3 Pomeroy's Eq. Jur., section 1212, it is said, "The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his benefit; such a person is in no true sense a mere stranger and volunteer."

The rule was thus stated in *Wilson v. Brown*, 13 N. J. Eq. 277: "To entitle a party who pays the debt of another to the rights of the creditor by subrogation, the debt must be paid at the instance of the debtor, or the person paying it must be liable as surety or otherwise for its payment."

 Warford et al. v. Hankins.

In *The Receivers of New Jersey, etc., R. W. Co. v. Wortendyke*, 27 N. J. Eq. 658, the court said: "It is not sufficient that a person paying the debt of another should do so merely with the understanding on his part that he should be subrogated to the rights of the creditor. Conventional subrogation can only result from an express agreement either with the debtor or creditor."

The rule as stated in the foregoing New Jersey cases is supported by the following authorities, some declaring the rule to be as stated in the first, and others as stated in the last case. *Gore v. Brian* (N. J. Eq.), 35 Atl. 897; *Shinn v. Budd*, 14 N. J. Eq. 234; *Tradesman Building, etc., Assn. v. Thompson*, 32 N. J. 133; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Sanford v. McLean*, 3 Page 116, 122, 23 Am. Dec. 773; *White v. Knapp*, 8 Page 173; *Swope v. Liffingwell*, 72 Mo. 348, 360; *National Bank v. Cushing*, 53 Vt. 321, 326; *Stebbins v. Willard*, 53 Vt. 665, 667; *Payne v. Hathaway*, 3 Vt. 212; *Good v. Golden*, 73 Miss. 91, 94, 95; *Union, etc., Trust Co. v. Peters*, 72 Miss. 1058, 1070, 1071, 30 L. R. A. 829; *Fievel v. Zuber*, 67 Tex. 275, 280; *Dillon v. Kauffman*, 58 Tex. 696; *Oury v. Saunders*, 77 Tex. 278, 280, 13 S. W. 1030; *Whiteselle v. Texas Loan Agency* (Tex. Civ. App.), 27 S. W. 309, 314; *Reimler v. Pfingsten* (Md.), 28 Atl. 24; *Mitchell v. Butt*, 45 Ga. 162; *Fuller v. Hollis*, 57 Ala. 435; *Heuser v. Sharman*, 89 Iowa 355; *Tribble v. Nichols*, *supra*; *Owen v. Cook*, 3 Tenn. Ch. 78; *Citizens Nat'l Bank v. Wert*, 26 Fed. 294; 1 *White & Tudor's Leading Equity Cases* 875; 2 *White & Tudor's Leading Equity Cases*, 288; 24 *Am. and Eng. Ency. of Law*, p. 281, 290-296; 1 *Jones on Mortgs.*, sections 1091, 1092; *Harris on Subrogation*, section 792; *Sheldon on Subrogation*, sections 247, 248; 2 *Beach Eq. Jur.*, section 806.

In *Gans v. Thieme*, *supra*, the court said: "A volunteer cannot acquire either an equitable lien or the right of subrogation, * * * but one who, at the request of another, advances his money to redeem or even to pay off a security in which that other has an interest, or to the discharge of which he is bound, is not of that character, and in the absence of an express agreement one would be implied, if necessary, that it shall subsist for his use, and it will be so enforced. But the doctrine of substitution may be applied although there is no contract, express or implied. It is said to rest 'on the basis of mere equity and benevolence' (*Cheesebrough v. Millard*, 1 John Ch. 409; 1 Story Eq. Jur., section 493), and is resorted to for the purpose of doing justice between the parties. Here the defendants have no equity. In any aspect of the case the plaintiffs have paid a debt which the testator ought to have paid and a mortgage to which the land was subject, under the belief authorized by the words of the legal representatives of the deceased, that they were to have a valid security upon it. It has not been given to them, and it will subserve the purposes of justice and violate no rule of law to subrogate them to the lien of the mortgage against any of the parties to this action, since their title was affected by it, * * * and no wrong can be done to either by putting the plaintiffs in the place of the original creditor."

This doctrine is also supported by the cases which hold that when a third party, at the request of a debtor, loans the money to him to pay a debt secured by mortgage or other lien, under an agreement that he shall have a mortgage on the same real estate to secure him in such loan, and after the same is paid the debtor refuses to give the mortgage, or if given it proves invalid or ineffectual for any reason, or if there are intervening liens of which the person making the

Warford et al. v. Hankins.

loan or payment had no notice or knowledge, such person is entitled to be subrogated to the mortgage or other lien securing the debt paid. *Thompson v. Connecticut Ins. Co.*, 139 Ind. 325, 346, 349, and cases cited; *Johnson v. Barrett*, 117 Ind. 551; *Spaulding v. Harvey*, 129 Ind. 106, 13 L. R. A. 619; *Edinburg American, etc., Co. v. Latham*, 88 Ind. 88; *Sidener v. Pavey*, 77 Ind. 241; *Gans v. Thieme, supra*; *Baker v. Baker*, 2 S. D. 261; *Farm Land Co. v. Ellsbree*, 55 Kan. 562; *Crippen v. Chappel*, 85 Kan. 495; *Milholland v. Tiffany*, 64 Md. 455; *Detroit, etc., Ins. Co. v. Aspinall*, 48 Mich. 238; *Gilbert v. Gilbert*, 39 Iowa 657; *Union, etc., Trust Co. v. Peters, supra*; *Ogden v. Totten (Ky.)*, 34 S. W. 1081.

The lien reserved in the deed conveying the real estate to Mackey and Sullivan was notice to appellants Huston and Warford of the rights of appellee. *Sample v. Cochran*, 84 Ind. 594, 596. Besides, the special finding shows that the mortgage executed to appellant Huston to indemnify him as surety and to secure the note payable to appellant Warford was given to secure preexisting debts and liabilities, and would not therefore cut off prior equities. *Citizens National Bank v. Judy*, 146 Ind. 322, 330, and cases cited.

Whatever rights, therefore, appellee has against Mackey and Sullivan, under the agreement with them to enforce said lien, may be enforced against said appellants Huston and Warford.

The special finding shows that the money was loaned to Mackey & Sullivan to take up said note, under the express agreement, made with them, that appellee should hold the note uncanceled, and that the lien reserved in the deed should be kept alive to secure her. Under the authorities cited it is clear

Warford et al. v. Hankins.

that appellee is entitled to enforce said lien against appellants the same as Cosby could have done if the same had not been paid to him.

It is insisted that under the rule declared by this court in *Binford v. Adams*, 104 Ind. 41, appellee is not entitled to enforce said lien. In that case Walker executed a note to Gant and secured it by a mortgage on his real estate, Gant sold the note and mortgage to Boyd, and indorsed the note to him. Afterwards Gant requested Walker to pay the note, and Walker made arrangements with Binford to pay the note, which Binford did. Boyd marked the note paid on his book, and delivered the note to Binford. Gant died, and Binford sued Gant's administrator to recover upon Gant's indorsement of the note, and this court held that there could be no recovery on the indorsement. There is a wide difference between that case and this. If the action in that case had been brought to foreclose the mortgage executed by Walker to secure the note, a different question would have been presented. If Binford was entitled to subrogation under the facts of that case it was only to foreclose the mortgage against Walker, the maker of the note, at whose request he had paid the note. As between Gant and Walker the latter was primarily liable on said note, and even if Binford paid the note under an agreement with Walker that he should hold the note and mortgage to secure him in such payment, this would not have given him any right to maintain an action against Gant on his indorsement. Walker's agreement could only continue the note and mortgage in force as against himself and the mortgaged real estate. It was properly held, therefore, that so far as Gant was concerned, Binford was a mere volunteer, and acquired no rights against him, and as

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

to Gant and Boyd, the note was paid and satisfied. It follows from what we have said that the trial court did not err in its conclusions of law. Judgment affirmed.

ABBITT, ADMINISTRATRIX, v. LAKE ERIE AND
WESTERN RAILWAY COMPANY.

[No. 17,007. Filed May 24, 1898.]

INSTRUCTIONS.—*Must Be Applicable to the Evidence.*—An instruction is not only required to state correct legal principles, but it should so state them that the jury may be able to apply them to the particular evidence to which they are germane. *p. 513.*

NEGLIGENCE.—*Co-employee.*—*Imputed Negligence.*—*Contributory Negligence.*—Where two persons are associated together as car inspectors, and by an arrangement or agreement between them, either express or implied, it became the duty of one while the other was under a car engaged in the inspection and repair thereof, to look out, and give notice to the other of approaching danger, the relation of principal and agent exists between them in this respect, and if the former fails to perform such duty, and by reason of his neglect his co-employee is injured by an approaching train, such negligence is imputable to the latter, and in order that a recovery can be had for such injury it is incumbent upon plaintiff to show freedom from contributory negligence on the part of his co-employee. *pp. 513, 514.*

INSTRUCTIONS.—*Invasion of Province of Jury.*—An instruction given to the jury in the trial of an action against a railroad company for damages for the death of an employee caused by defendant backing a car against another car under which deceased was at work, to the effect that if a red light was on the rear platform of the car under which deceased was at work when injured, and if you find from the evidence that a red light by night is a danger signal, and if defendant's employees knew, or might have known, that such a light, in general railway usage, so placed, was a signal of danger, then such facts made it the duty of such employees to heed it and exercise care and caution, etc., was a usurpation of the functions of the jury, where the evidence was conflicting as to whether the red light on the car at the time of the accident was a signal of danger. *pp. 514-520.*

From the Marion Superior Court. *Affirmed.*

J. E. McCullough and *H. N. Spaan*, for appellant.
John B. Cockrum, *W. H. H. Miller*, *J. B. Elam*
and *F. Winter*, for appellee.

150	498
152	38
150	498
156	206
156	289
150	498
163	309
4168	529
150	498
164	161

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

JORDAN, J.—Appellant, as the administratrix of William F. Abbitt, instituted this action in the special term of the Marion Superior Court to recover of the appellee railroad company, damages for the alleged negligent killing of her decedent. On a trial before a jury she was successful in her action, and a verdict was returned in her favor for eight thousand dollars, and over appellee's motion for a new trial, judgment was rendered upon the verdict. From this judgment appellee appealed to the general term of the Marion Superior Court, where it secured a reversal, and from the judgment of the general term, reversing that of the special term, the administratrix has appealed to this court.

The complaint upon which the action is based is in three paragraphs, and the material facts averred in each of them may be summarized as follows: By the first paragraph, it is disclosed that the plaintiff is the administratrix of the estate of William F. Abbitt, deceased; that on June 4, 1891, decedent was an employe of the Cincinnati, Hamilton & Dayton Railroad Company as a car inspector. Part of his duty as such was, every morning at about 3:45, to inspect the cars of a train which left the Union Station at Indianapolis, Indiana, at 3:55 a. m. over said C., H. & D. road for Cincinnati, Ohio, and to change a "draw bar" on a certain sleeper, which was transferred from the Vandalia to the C., H. & D. Co.'s tracks, to become a part of said train. On said date, decedent was under one of the cars of said train, as it stood in the Union Depot, inspecting the same and changing the "draw bar" or coupler, as was his duty, said train at the time not being fully made up and not coupled together, and upon the rear thereof were hung out red danger signals, as danger signals to other railway employes and the public, warning them that it was unsafe to at-

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

tempt to switch cars about there, or to attempt to couple the same to said train while the same was being inspected, and while decedent was performing said duty under and about them. While decedent was so engaged, certain employes of defendant, well knowing that decedent was so performing his said duty in and about said train, and notwithstanding the presence of said danger signals, carelessly and negligently backed a car against the one decedent was under and inspecting, crushing him to death. Absence of contributory negligence on the part of the decedent is alleged. Decedent was thirty-two years old, in good health, earning \$1.90 per day; left plaintiff as his widow, but no child or children, and damages in the sum of \$10,000.00 are demanded.

By the second paragraph it is shown that plaintiff is the duly appointed administratrix of said decedent's estate. That on June 4, 1891, decedent was in the employ of the C., H. & D. Ry. Co. as a car inspector, part of his duty as such being, every morning at about 3:45, to change a "draw bar" on a certain sleeper that was changed from the Vandalia tracks to those of the C., H. & I. in making up the morning train on said last named road, bound for Cincinnati. At said time on said morning decedent was under said car as it stood in the Union Depot on the track used by the C., H. & I. Co., inspecting the same and changing the "draw bar" or coupler, as was his duty, said train not yet being coupled together, and the sleeper aforesaid standing away from the cars constituting the remainder of said train. Said car formed the rear of said train, and had hung out upon the rear end thereof red danger lights and signals, known as "markers" and danger lights, to denote the end of the train to those coming from the rear, and to the engineer in front when running, also to warn persons in charge of trains that

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

there is danger in approaching such car upon which such lights are displayed. Defendant's servants at the time and place aforesaid were backing and pushing a car along the track upon which the train and sleeper under which decedent was at work was standing, and attempted to couple the same on the rear end of the car under which decedent was at work. The servants of the defendant were engaged in the employment of switching, and backed and pushed said car carelessly and negligently against said sleeper, with such force and violence as to cause the wheels thereof to run onto and over decedent, crushing and mangleing him, so that he died as a result of the same. Freedom from contributory negligence on the part of the decedent, and his age, etc., are alleged.

The third paragraph alleges facts similar to the first and second, but avers that in order to change the "draw bar" and coupler, it was necessary to get under the front end of the sleeper to loosen one bar or coupler, and to put in the other bar. That according to the common usage of railway companies whose lines center in Indianapolis and use the Union Depot in their passenger traffic, and all other lines and places along said lines, the use of red lights is a signal of danger and warning, and when such lights are placed upon the rear platform and end of a car, or in other places, they are, in such positions, a signal of warning and danger to all employes of all railroads using, as aforesaid, said Union Station, and it is such signal on all other railroads along the several lines; and when such red lights are displayed, it is the duty of trainmen approaching the same to use care, and is notice that danger is near. While decedent was working under the car there was upon the rear platform and end of said car, red lights, or danger signals, and decedent, as a railway employe of experience, knew that, so placed,

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

were such danger signals to all who might come about said car, whether in course of duty or otherwise; and said danger signals were in use on said C., H. & D. Ry. Co.'s lines, and had been for a long time prior thereto. While decedent was at work, and when such danger signals were so displayed upon the rear end of the sleeper, certain employes of defendant, carelessly and negligently backed and pushed cars against said sleeper, without paying sufficient attention to said signal of warning and danger, and not sufficiently heeding the same, well knowing that such red light was such signal and warning, and it being their duty, in the presence of such signals, to act with care and caution, they then and there acting as trainmen and as a switching crew, that being their duty. When said car, aforesaid, was backed and pushed, it ran upon and over the decedent, crushing him to death, etc. Freedom from contributory negligence, and facts in respect to the age of the decedent are alleged, and the demand is for \$10,000.00.

It may be said, we think, under the theory upon which each of these paragraphs proceed, that the wrong imputed to the defendant, and the negligence upon which the plaintiff founds her action, consist in the act of the defendant in disregarding the red lights or danger signals on the end of the car in question, and, under the circumstances, backing or pushing the car or cars against the one under which the decedent was engaged at work, as alleged, and thereby killing him. The following, in the main, may be said, we think, to be a summary of the facts disclosed by the evidence in respect to and concerning the alleged negligent killing of appellant's decedent: On and for some time prior to June 4, 1891, the Louisville, New Albany & Chicago Railroad Company, known as the "Monon" company, had a running arrangement

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

with the Cincinnati, Hamilton & Dayton Company, known as the "C., H. & D." company, operating the Cincinnati, Hamilton and Indianapolis Railroad, by which a solid train was run from Chicago to Cincinnati, in which passengers were carried through without change of cars. One of these trains so run was known as "Number 33." A Monon engine, with its crew, brought this train from Chicago to Indianapolis, and at a point east of the Union Station in said city, pulled it on to a "Y" and from that point backed it into the Union Station, and headed it east for Cincinnati. The Monon engine would then be detached, and an engine of the Cincinnati, Hamilton & Dayton Co. would pull the train to Cincinnati. At and before the time of the accident in controversy, the Monon company had no switching facilities of its own at Indianapolis, and consequently had a general arrangement or agreement with the Lake Erie & Western Railroad Company, appellee herein, under which all switching required by the Monon was performed by the appellee. Train number 33 was scheduled to arrive at Indianapolis daily, shortly after 3 o'clock in the morning, and always brought one sleeper for the use of Indianapolis passengers, which would be cut off and left at the yards at Indianapolis. This sleeper was usually, it seems, the rear car on the Monon train, and when it reached the "Y" heretofore mentioned, it would be uncoupled and taken to the yards, and was not backed into the Union Station with the remainder of the train. It sometimes occurred that an extra sleeper would be attached to the Monon train, to be placed in the rear of the Indianapolis sleeper. This, however, was usually an empty sleeper, being transferred from one end of the road to the other so as to be convenient when needed. When this occurred, it appears that appellee's yardmaster would

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

be informed by telegraph by the Monon company in regard to this extra sleeper, and directions would be given by him to the switching crew in respect to its disposition. If it was intended that this sleeper should continue with the train until it reached Cincinnati, the employes of the C., H. & D. company were informed by the Monon company, so that they could provide for the extra sleeper. At the time of the accident by which Abbitt was killed, train number 33 carried an extra sleeper, which it was ordered should be taken on to Cincinnati, and this sleeper seems to have been the rear coach of the train from Chicago to Indianapolis. Appellee's yardmaster at Indianapolis was informed by the Monon company, by a telegram, of the order in regard to the destination of this sleeper, but it appears that the Monon company failed to notify the employes of the C., H. & D. in regard to this extra sleeper. When train number 33, on the morning of June 4, 1891, reached Indianapolis, the regular Indianapolis sleeper, together with the extra sleeper mentioned, which, as stated, was in the rear of the train, was detached at the "Y," and taken by appellee's switching crew to a point west of the Union Station, at which place the crew waited until they were signaled by the switchman of the Union Railway Company that the track under the train shed was clear, and that they might enter and go upon the C., H. & D. switch and push the extra sleeper along the track to the rear end of train 33. In addition to the cars brought by the Monon from Chicago, a chair car from the Indianapolis, Decatur and Western Railroad, and a sleeper from the Vandalia road, both of which railways enter the city of Indianapolis from the west, were attached, at Indianapolis, to train 33, and were standing, it seems, uncoupled on the rear end of that train before appellee's switch engine with the extra

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

sleeper had come on to the C., H. & D. track. These two coaches were still separated from train 33 at the time appellee's switching crew received the signal from the station switchman to enter on to the track of the C., H. & D. The uncoupled Vandalia sleeper was the rear one of the two cars. The extra sleeper, having been the last car constituting train 33 as it was run over the Monon road from Chicago, was intended to be the last coach on the same train, which was to be taken by the C., H. & D. to Cincinnati. On the morning of the accident, appellant's intestate, William F. Abbitt, and one William Lichtsin, were in the employ of the Cincinnati, Hamilton & Dayton Railway Company as car inspectors, and had been engaged in such service for said company for sometime prior to that date. As such inspectors it was part of their duty to be present at the Union Station at Indianapolis when said train 33 arrived from Chicago and inspect the same to see if the cars were in good condition. As the Indianapolis, Decatur & Western chair car and the Vandalia sleeper became a part of train 33 at Indianapolis, the inspection required of Abbitt and Lichtsin included these two cars. The Vandalia sleeper usually carried a coupler unlike the one used on the C., H. & D. road, and therefore in order that the Vandalia sleeper might be properly coupled to train 33, it was necessary to change its coupler. This work required some three or four minutes, and was done by the two inspectors after the Vandalia sleeper was run into the Union Station, the coupler being taken out by removing the draw bar, of which it was a part, and the other coupler being taken from a box carried under the sleeping car near its center, and substituted for the one removed. In doing this work it became necessary for one of the inspectors to get under the Vandalia sleeper, between the rails of the track on which it

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

stood, and remove the keys which held the draw bar. The Union Station was lighted by electricity, and while one of these inspectors sat under the sleeper, removing the keys from the draw bar, the other stood on the platform near the track and held a torch carried by him, so as to give the other under the car a better light. There is evidence showing that the standard rules adopted and observed by railroads in the country require that car inspectors, or other employes, while working under a car, should protect themselves at night by displaying a blue light, and by day a blue flag, from the platform of the car under which they were at work. There is also evidence showing that not much work was done at the Union Station which required car inspectors or other employes to be under a car for any length of time, as all defects of any serious nature were repaired at the yards, and for this reason it appears some railroad companies did not use a blue flag or a blue light at the Union Station to indicate that a man was at work under a car, and it seems that the C., H. & D. Company did not resort to the use of these blue signals at all, but that two of its car inspectors would operate together. There was also evidence showing that what is termed the "Big 4" railroad system, required four of its inspectors to work together at the Union Station. On the morning in controversy it appears that Abbitt and Lichtsin began the inspection of this train 33, at about 3:40, according to the usual custom, when it was standing in the Union Station at Indianapolis. They commenced at the east end of the train, one of them passing along the north side, and the other along the south side of the train, examining the cars as they went along, sometimes placing their bodies in whole or in part, when necessary, under the cars, in order to see if everything was all right. Finding nothing wrong on

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

that morning with the cars first examined, they went west on the plank platform mentioned and inspected the chair car of the L. D. & W., which car was standing near, but not coupled to the train. Discovering nothing wrong with this car, Abbitt and Lichtsin proceeded next to the Vandalia sleeper, which stood uncoupled on the same track a little west of the chair car. This sleeper was found to be in good order, except that it was necessary, as usual, to change its coupler. The inspection being so far completed, the inspectors passed along on the south side of the Vandalia sleeper to the middle of this car, and then removed the coupler from the box and passed on to the east end of the sleeper, where the change of couplers was to be made. Abbitt then seated himself on the ground under the east end of this car, between the rails, and proceeded to remove the draw bar on the car. Lichtsin, leaving Abbitt in this situation, walked back to the middle of the car, picked up his torch, which he had laid down, and came and stood on the wooden walk or platform near where Abbitt was at work under the car, and held the torch so as to afford Abbitt a better light. About the time the two men had completed the inspection and started along the south side of the Vandalia sleeper with the intention of changing its coupler, appellee's switching crew, which had been for some time waiting west of the train shed, were signaled by the Union Railway switchman to back into the station on the C., H. & D. track. The crew obeyed this signal or order, and began to back or push the two sleepers which were ahead of the switch engine into the shed, at an ordinary rate, ringing the bell as they approached the Vandalia sleeper. Two of the switching crew, the foreman and his helper, stood on the east platform of the extra sleeper, which they were to couple on to the west end

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

of the Vandalia sleeper, and some of them had a full view of the latter sleeper, the train shed being at the time lighted up by electric lights. Both of these men, while some distance away from the Vandalia sleeper, saw the car inspectors as the latter were passing towards the front of the train which they had been inspecting, and before they had attempted to change the coupler of the Vandalia sleeper. They knew, as the evidence shows, that the men whom they saw were car inspectors from the torch which they carried, but had reasons to believe that these men had completed their inspection and were going away. The Monon company having failed to inform the C., H. & D. company of the extra sleeper that was to be attached to train 33 on the occasion in question, the employes of the latter company therefore believed that the Vandalia sleeper was to be the rear end of train 33, consequently, sometime before the appellee's crew was signaled to back into the train shed, a brakeman of the C., H. & D. company had placed the ordinary markers on the rear end of this car. These markers were lanterns, showing a red light, towards the rear or west end, as the Vandalia sleeper then stood, and a green light on the side facing towards the engine, or front of the train, and they were placed or hung between the rear platform and its roof. The evidence all apparently seems to agree that these markers are used to indicate the rear end of a train when en route, so that anyone approaching it from behind could see the red lights and not run against the car, and also, in order that the engineer, while running his train, may see the green lights from his engine, and thereby know that his train was all connected. In addition to these markers, it seems that the brakeman of the C., H. & D. company had placed an ordinary brakeman's lantern, showing a red light, on the rear of the

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

platform of the Vandalia sleeper. With these lights, and no others, on the rear of the Vandalia sleeper, appellee's switching crew pushed the extra sleeper against the rear end of the Vandalia sleeper, for the purpose of coupling it on to the latter, and in order that the automatic coupler might operate and effect a coupling, it was necessary to strike the Vandalia sleeper with some force, and in doing so, the latter car, under which Abbitt was at work at the time, was pushed east, running against and over him and injuring him so as to cause his death. It seems that the deceased was injured by the car running over him just as he was attempting to escape from under it in response to a warning given by Lichtsin, too late, however, to be available to save him. The evidence discloses that there was a contrariety of opinion among the witnesses who testified in the trial court as to whether the brakeman's red lantern on the west end of the Vandalia sleeper was an admonition or warning to the employes of appellee not to touch or couple on to that car. The claim that this lantern was an ordinary red lantern carried by a brakeman, seems not to be contradicted, and it appears that sometimes this kind of a lantern was placed inside of a car, and sometimes set upon the rear platform during the trip, while the train was running. A number of witnesses testified that this lantern, placed as it was, on the rear of the car on the morning in question, as it stood in the train shed, had no special significance. They testified that it added nothing to the markers which were used for the purpose heretofore stated, and its presence on the car at the time did not admonish or forbid appellee's switching crew from touching or coupling to the car, nor did it indicate that there were persons under the car or in a position that they might be subjected to injury by the coupling. The evidence established

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

that a red light of some kind was commonly used upon railroads as a danger signal after night, but there was much evidence to show that the question of its being a danger signal depended upon circumstances. That there were many positions in which a red light might be seen by an engineer and it would not require him to stop upon seeing such light. It also appeared from the testimony of these witnesses that if a red lantern was seen in the hands of a brakeman, or standing on the platform of a car at a station, or in any other position, when, under the circumstances, an engineer might have reasons to believe that he understood what it signified, or knew that it had no particular significance, he might act upon such appearances, and need not, in all cases, stop his train to make a particular investigation. There was evidence also tending to prove that a red light on the rear end of the car under which Abbitt was at the time of the accident, in connection with the markers thereon, signified nothing in addition to the latter, and that, under the circumstances, appellee's employes were not required to heed it by not coupling to the car, or to act differently than they did. There is evidence also tending to show that Abbitt and Lichtsin were associated together in making the inspection of the cars at the Union Station, not only that they might aid each other in the work, but that the watchfulness of one might protect the other from injury incident to the work in which they were engaged. In fact, Lichtsin, who was a witness in behalf of appellant, testified that when one of them was under the car it was the duty of the other to watch out for approaching cars, and to signal them down so as to protect the one under the car, and that this was his duty at the time of the accident. There is also evidence tending to show that Lichtsin, while Abbitt was under the car where he

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

was killed, placed himself in a position where he could not see the approaching cars as they were being pushed into the shed by appellee's employes, and the jury find this fact to be established by their answer to an interrogatory. The evidence also shows that the decedent at the time of his death was about 33 years of age, of industrious habits, and was earning from \$1.75 to \$1.90 per day; that he left no children, but left the appellant, Della Abbitt, as his widow, whose age the evidence does not disclose.

Among the errors assigned by the appellee on its appeal from the special to the general term was the action of the trial court in overruling its motion for a new trial, and also in overruling its motion for a judgment upon the answers of the jury to the interrogatories.

The reasons assigned for a new trial in the lower court were the insufficiency of the evidence, and the giving of certain instructions, and the refusal to give others at the request of the defendant, and that the damages are excessive. The error assigned by appellant in this court is that the court in general term erred in reversing the judgment of the court at special term. The burden, therefore, is cast upon the appellant in this appeal to show that the judgment of the court at general term, reversing the one rendered in special term, is not a correct result, under any of the questions presented by the assignment of error at the special term. If we can hold that in consideration of any of the errors presented, under the assignment at general term the judgment of reversal by that court is a correct result, then an affirmance of it by this court must necessarily follow. The question is not whether the reasons given by the court in general term for a reversal are sufficient, but it is whether its judgment should be reversed by this court, as demanded by ap-

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

pellant, and the judgment at special term affirmed. *Springer v. Byram*, 137 Ind. 15, 45 Am. St. 159.

Appellee, in the trial court, presented and requested, among others, that instruction number four in its series be given to the jury, which request, over appellee's exceptions, was refused. This instruction is as follows: "It is also the law that where two or more persons are about entering upon a railway track for the purpose of crossing over, walking upon it, or engaging in any work thereon, and the circumstances are such that one of them only can keep a lookout for approaching trains or cars, then his companion or companions relying upon him are bound to see that he discharges the duty resting upon them all, as he acts for all, and unless it be shown that all such persons have taken reasonable care to see that the vigilance required by the law is exercised, then there can be no recovery, even though the person injured is not the one who was in such situation that it was his duty to look and listen for approaching trains or cars." The refusal by the court of this instruction upon the trial seems to have been influential at the general term in securing a reversal of the judgment. In fact, no other questions seem to have been considered by that court. While it may be said that there is evidence and circumstances in the case tending to support the doctrine of imputed negligence arising out of what it is claimed the evidence shows to have resulted in respect to the association of the car inspectors in their work, and the understanding or agreement between them that when one was under a car it was made the duty of the other to watch out for approaching trains and notify his companion of their approach, or signal them down, which duty, it is claimed, the evidence discloses was incumbent upon Lichtsin, under the circumstances, and which it is said the evidence shows

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

that he neglected to discharge. But even though the instruction in question, as formulated, upon any view, could be said to be a correct exposition of the law, which at least may be asserted as doubtful, still it may be said that it is so framed as to present the question to the jury as an abstract proposition, and not in a manner applicable to the particular evidence in this case. To say the least, it certainly would have left the jury in doubt or uncertainty as to how it should be applied to the evidence in this case, and for this reason alone the court was justified in refusing to give it. An instruction is not only required to state correct legal principles, but it should so state them that the jury may be able to apply them to the particular evidence to which they are germane. *Judd v. Martin*, 97 Ind. 173.

The rule of imputed negligence is very fully discussed by the learned counsel representing the respective parties in this cause, and we agree with counsel for appellant that the extreme doctrine asserted in *Thorogood v. Bryan*, 8 C. B. 115, has never been sanctioned in this jurisdiction, and has been repudiated in England and by most of the courts of this country. It may, however, be affirmed as a correct doctrine, under the authorities, that if Abbitt and Lichtsin were associated together in their work of car inspection at the time of the accident, and if by any arrangement, understanding, or agreement between them, either express or implied, it became Lichtsin's duty when Abbitt was under a car upon the railroad track during the inspection or work performed by them, to look out for approaching trains or cars, and either signal them to stop or warn Abbitt of their approach, then, in this respect, and to this extent, at least, Lichtsin might be said to have been serving the former, and

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

under such circumstances the relation of principal and agent in this regard could be said to exist between them, and if Lichtsin neglected to discharge the duty so imposed upon him, and thereby contributed to the accident in question, such negligence, in legal contemplation, would be the negligence of Abbitt, and justly imputable to him. Or, in other words, if, under the circumstances, at the time of the fatal accident, Abbitt attempted or undertook to exercise the care which the law exacted of him through the agency of Lichtsin, then it would be incumbent upon the plaintiff in this action to show, at the time of the accident, freedom from contributory negligence on the part of Lichtsin. The following authorities, and others, support this doctrine: *Town of Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. 827; *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280, 19 Am. St. 96; *Chicago, etc., R. R. Co. v. Spilker*, 134 Ind. 380, on p. 403 of the opinion, and cases there cited; *Brannen v. Kokomo, etc., Gravel Road*, 115 Ind. 115, 7 Am. St. 411; Beach on Contributory Negligence (2nd. ed.), section 103; *Minster v. Citizens R. W. Co.*, 53 Mo. App. 276; *Puterbaugh v. Reasor*, 9 Ohio St. 484; *Nesbit v. Town of Garner*, 75 Ia. 314, 9 Am. St. 486, 39 N. W. 516; *City of Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35; 4 Am. and Eng. Ency. of Law, p. 82, section 38.

The instructions given by the court do not seem to have advised the jury in regard to this feature of the law, which, we think, under the evidence and circumstances, may be said to have been applicable, but, passing this question, we next consider the fourth instruction in the series given by the court on its own motion. This instruction counsel for appellee particularly and strenuously assail. The charge in question deals with two subjects. By the first part, the court endeavored to define in a general way the legal

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

rights and obligations of the deceased and appellee at the time of the accident, and this part is as follows: "If the deceased, William Abbitt, and the car inspector working with him were at the time of the injury to Abbitt engaged as employes of the Cincinnati, Hamilton and Dayton Railroad Company, in discharge of their duties as inspectors of trains of cars, rightfully standing on the tracks of the Union Railway Company, then such car inspectors were at the place they were so engaged rightfully and not trespassers. So, also, if the employes of the Lake Erie & Western Railway Company were under proper orders backing cars into the Union Station on the same sidetrack, rightfully, in obedience to orders, then such employes were properly upon the track. Under such circumstances, where two or more parties have the right to use the same railroad track for certain purposes, it is the duty of individuals about to cross such a track, or working on or about it, to be on the lookout for approaching trains of cars, and to act upon the assumption that such cars may come at any time. It is the duty of such persons to look and listen vigilantly for approaching trains of cars at such times and places as are reasonably likely to give them timely warning as to such train or car, and enable them to secure their safety. And if there is a failure to discharge this duty, then there can be no recovery for injury inflicted by such train or cars, even though the persons in charge thereof are negligent; and this, for the reason that, in order to recover in such case, there must be present a case of unmixed negligence, and not a case where there was negligence on both sides. As it is sometimes put, where both parties are to blame, there can be no recovery on the part of either."

Counsel for appellee criticise this part of the charge

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

for the reason, as they claim, that it ignores all questions relative to the contributory negligence of Lichtsin, which they claim the evidence discloses. But without stopping to consider the objections urged in this respect, we have carefully examined that part of this instruction which deals with the question in regard to the light on the car at the time the deceased sustained his fatal injury. This portion is as follows: "The presence of lights on the car under which it is claimed Abbitt was working at the time he is alleged to have been injured, if such lights were shown to have been there, is of no significance in this case, unless it is further shown, as alleged in plaintiff's complaint that such notice was notice to the employees of the defendant company that it was unsafe to couple cars to the car bearing such lights in the manner in which it is claimed it was done in this case. If such lights were not a warning against so coupling to a car bearing them, it does not matter, so far as this case is concerned, what else they may have indicated; *but, if you find from the evidence in this case, that a red light by night is a danger signal, and known to be such generally by railroad employes engaged in the business of running trains and switching on the railroads about and in the city of Indianapolis, and if you further find that such a red light was placed upon the rear platform of the car under which the deceased was at work, as alleged, when he was crushed and killed, as alleged, and that the servants of the defendant knew before the accident to the deceased that the red light was displayed on the rear platform of the car in question, and if such employes knew or might have known by the exercise of reasonable care, that in general railroad usage such a red light so placed meant danger, and was a signal of danger, it was then and there their duty to heed such signal and to act with*

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

care and caution in its presence, although they may not at the time have known what the particular danger was." (Our italics.)

It is apparent, we think, in consideration of the issues and the evidence in this case bearing thereon, that the court in giving this latter part of the instruction usurped the rights of the jury, and invaded their province. If, however, it could be said in its favor that it did not invade the functions of the jury, it is certainly open to the objections that it is contradictory, and thereby misleading, and is calculated to leave the jury in doubt as to the law upon the question involved, and this alone would condemn it. Appellant's theory of the case was that the lights on the car under which the deceased was at work at the time of the accident were notice or warning to appellee's servants that it was unsafe to couple to the car, and hence their act in doing so, after being so admonished or warned, was negligence. It is true that there is evidence tending to support appellant's theory in this respect, but, upon the other hand, there is evidence fully tending to rebut it. A number of witnesses, who are said to be experts in regard to the significance of a red light as employed on cars in the railway service, testified upon the trial. All the evidence seems virtually to agree that the green and red markers which had been placed upon the rear end of the car in controversy as it stood in the Union Station, were used to indicate the rear of the train, when running, and also to signify to the engineer that his train had not parted. The witnesses may be said virtually to have agreed also that a red light by night, as a general rule, in railway circles about Indianapolis and elsewhere, was recognized or known as a danger signal, but there was considerable evidence going to show that a red light at night did not mean danger, under all circumstances. Much evi-

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

dence was introduced by appellee tending to prove that the red light resting on the rear of the car in question, as it stood at the time of the accident, was not significant of any danger, and that appellee's employes, under the circumstances, were not required to heed it as a danger signal, warning them not to touch or couple to the car. That it was not their duty, under the particular circumstance, to exercise any other or different care or caution than they would have been required to do had the red light not been displayed in connection with the markers. There was evidence tending to prove that the red lantern of the brakeman on the car, along with the markers, added nothing by way of significance to the latter; that it simply served to better mark the rear end of the train, but did not signify that any one was around or about the car in a position of danger at the time. The mooted question, under the evidence, in respect to the light, was not whether a red light by night, in railway usage, was employed as a signal of danger, but whether the particular red light on the car at the time, in connection with the markers, indicated anything different than the latter did, thereby making it the duty of appellee's switching crew to give heed thereto and not couple to the car. The question in issue between the parties, under the evidence given by each, was whether appellee's switching employes ought to have heeded this light and exercised care by not coupling to the car; but the court, after stating certain general facts, if found to be true, tells the jury what inference they shall draw from these facts. The rule is well settled that it is a usurpation of the functions of the jurors for the court to tell them what inferences or conclusions they ought to draw from a given fact or series of facts. *City of Columbus v. Strassner*, 138 Ind. 301, and authorities there cited.

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

The court, by the latter part of the charge in dispute, in effect, told the jury that if a certain statement of facts was proved—that is to say: That if a red light by night is a danger signal, and known to be such by railroad employes, and such a red light was on the rear platform of the car under which the deceased was at work when injured, and if appellee's employe knew, or might have known, that such a light, in general railway usage, so placed, was a signal of danger, then, such facts made it the duty of such employes to heed it, and exercise care and caution, etc. The question of the duty of appellee's employes to give heed to the light in controversy, was not one, under the circumstances, that the court had the right to determine, upon the series of facts which it gave or stated to the jury, but it was one of which the jury was the arbiter, upon the consideration of all the evidence that had any bearing thereon. It will be observed that the court confines its statement of facts to the red light alone, separating it from the markers which seem from the evidence to have been quite a feature in the case, when taken in connection with the red lantern of the brakeman. Under the evidence, that part of the charge in respect to the lights in controversy is so clearly wrong that nothing can be said, we think, in its support. From an examination of the record it does not appear, nor can it be said, that this charge did not injuriously affect the appellee. Other questions are presented relative to the sufficiency of the evidence, and in respect to the giving and refusal of other instructions, and denying the motion for a judgment upon the answers to the interrogatories, notwithstanding the general verdict, and also that the damages assessed are excessive, but as the judgment of the general term reversing that of the special term must be affirmed for the error in giving instruction

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

number four, we pass these without consideration, as they may not again arise on another trial. It follows, by reason of the error mentioned, that the judgment of the general term, reversing that of the special term, was a correct result, and is, therefore, affirmed; and the judgment of the special term is reversed, and the cause is remanded to that court, with instructions to grant the defendant, appellee herein, a new trial.

McCabe and Howard, JJ., dissent.

DISSENTING OPINION.

HOWARD, J.—I must dissent wholly from the conclusion reached by the majority of the court in this case. If the widow of a railroad employe may not recover for his death, under circumstances such as those disclosed in the record before us, and abstracted in the principal opinion, it is difficult to conceive of a case in which she could recover.

The errors assigned on the appeal from the special to the general term of the court below were: The overruling of the motion for a new trial, the overruling of a motion for judgment on the answers of the jury to interrogatories, and the insufficiency of the complaint.

The general term reversed the judgment at special term under the first assignment or error, giving as a reason for such reversal that the court at special term had refused to give the jury the following instruction, asked by the defendant in the trial court, the appellee on this appeal: "Fourth. It is also the law that where two or more persons are about entering upon a railway track for the purpose of crossing over it, walking upon it, or engaging in any work thereon, and the circumstances are such that one of them only can keep a lookout

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

for approaching trains or cars, then his companion or companions relying upon him, are bound to see that he discharges the duty resting upon them all, as he acts for all: and unless it be shown that all such persons have taken reasonable care to see that the vigilance required by the law is exercised, then there can be no recovery, even though the person injured is not the one who was in such situation that it was his duty to look and listen for approaching trains or cars."

The end proposed to be attained in requesting this instruction was that the jury should be informed that if the negligence of Lichtsin, if any, contributed to the injury of Abbitt, then such negligence of Lichtsin should be attributed to Abbitt as if it were his own, and no recovery could be had from the appellee company, whether the company were guilty of negligence or not.

I do not think the instruction correctly states the law; and I do not understand that the majority of this court are of opinion that the instruction was applicable to the facts in this case, even if it could be applicable to the facts of any possible case.

When two or more persons are about to enter upon a railroad track, it is the duty of each to look and listen for approaching cars; but it is not generally true that if one of such persons neglects his duty so to look or listen, his negligence can be imputed to the others. It is usually quite enough for a person to be responsible for his own negligence, without being called upon to answer for the negligence of some one else.

As well said by Judge Mitchell, in the *Town of Knightstown v. Musgrove*, 116 Ind. 121, 9 Am. St. 827: "One who sustains an injury without any fault or negligence of his own, or of some one subject to his

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

control or direction, or with whom he is so identified in a common enterprise, as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty occasioned the injury, even though the negligence of some third person, with whom the injured person was not identified, as above, may have contributed thereto."

It will not be said in this case, that Lichtsin was the agent of Abbitt, or subject to his control or direction. Neither was Abbitt so identified in a common enterprise with Lichtsin as to become responsible for any negligent conduct of which Lichtsin might be guilty. It would not be claimed that if some person were injured by Lichtsin's misconduct, that the relations of Lichtsin and Abbitt were such that the injured person might recover of Abbitt. They were simply co-employees, each responsible to the common employer, but not otherwise responsible for the faults of one another.

It is, of course, true, in the case of co-employees, in relation to their employer, or at least, was so, at the time of this accident, that if one employee were injured by the negligence of another, there could be no recovery against the employer; for the negligence of his co-employees was one of the risks which the employee undertook as a condition of his service. But, even in such a case, if the injury should be in part due to the negligence of the employer himself, such employer could not escape liability for his own wrong, no matter what might have been the negligence of the co-employee. *Rogers v. Leyden*, 127 Ind. 50.

Still less could a third party, as the appellee company in this case, escape liability for its own wrongs by charging negligence against one of the co-employees of another company. Such liability could be avoided

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

only by showing that the defendant company was itself not negligent, or else by the failure of the injured party to show that he was not himself negligent. See *Cray v. Philadelphia, etc., R. R. Co.*, 23 Blatchf. 263, 24 Fed. 168, 22 Am. and Eng. R. R. Cases, 351; *Perry v. Lansing*, 17 Hun 34.

The gist of the instruction, as applicable to the facts of the case, if at all applicable, is as follows: Where two or more persons enter upon a railroad track for the purpose of engaging in work thereon, but the circumstances are such that only one of them can keep a lookout for approaching trains, then his companion or companions relying upon him are bound to see that he discharges the duty resting upon them all, as he acts for all.

This instruction, while by its form, apparently seeking to avoid the question of agency, yet does, in reality, imply that the persons so engaging together at work are mutual agents of one another.

I have gone carefully over all the cases cited by counsel in support of their contention in favor of the instruction, and in so far as these cases are authorities in this jurisdiction, the relation of agency was in each case shown to exist between the parties.

In *Minster v. Citizens R. W. Co.*, 53 Mo. App. 276, cited by counsel to show distinctly "what must be regarded as a joint undertaking," where questions of negligence are concerned, the decision was as follows: "When the negligence of a gripman of a street railway car in the operation thereof and the negligence of a third person concur in causing injury to the conductor of the car, and the gripman is under the direction and control of the conductor, his negligence will be imputed to the conductor so as to debar the latter from recovering for the injury from such third person."

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

There is no doubt of the correctness of this holding. It has always and everywhere been held that one is responsible for the acts of his agent, done in the course of his employment, still more, as in this case, where "the gripman was under the direction and control of the conductor."

In the case at bar, however, there is nothing to show that Lichtsin was under the direction or control of Abbitt.

In *Puterbaugh v. Reasor*, 9 Ohio St. 484, Puterbaugh intrusted one Reddick "with the possession, custody, and care of his team." Reddick left the team and engaged in a fight with Reasor, at which time the team became frightened and ran away, and one of the horses was killed. The suit was by Puterbaugh against Reddick and Reasor for the value of the horse. The court declined to determine the relation sustained by Puterbaugh with Reddick, but held that Puterbaugh having entrusted Reddick with his team, and the injury having resulted from the negligence of Reddick in the care of the team, Puterbaugh must look to Reddick alone for a remedy. This is certainly a question of agency. Puterbaugh having constituted Reddick the custodian of his team, cannot recover from a third party for an injury resulting from the fault of his own agent. No question as to a "common enterprise" between Puterbaugh and Reddick is considered by the court.

Griffith v. Baltimore R. R. Co., 44 Fed. 574, which was a crossing case, is directly against the contention of counsel: "It is said, and said very truly," declared the court in that case, "that the plaintiff would not be responsible for the negligence of her mother, who was driving. That is true, but in that event it was just as much her duty to look and listen as it was the duty of her mother, and just as much

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

her duty to suggest that they stop and look and listen as it was the duty of the mother to stop and look and listen, and her duty to protest if that was not done." This case states the true doctrine on this matter: It is the duty of each person to take due care, but neither person, unless the relation of agency exists, is responsible for the want of care on the part of the other.

The Massachusetts case, *Allyn v. Boston, etc., R. R. Co.*, 105 Mass. 77, cited by counsel to show that a person riding in a carriage is responsible for the negligence of the driver, is itself dependent for authority upon *Thorogood v. Bryan*, 8 C. B. 115. The doctrine of that case has long since been repudiated in England, *Mills v. Armstrong*, 13 App. Cas. 1, and it has never been sanctioned by this court. *Miller v. Louisville, etc., R. W. Co.*, 128 Ind. 97, 25 Am. St. 416. Even in Massachusetts the doctrine of *Thorogood v. Bryan* has been greatly modified. *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583.

In the Texas case cited, *Johnson v. Gulf, etc., R. W. Co.*, 2 Tex. Civ. App. 139, 21 S. W. 274, though that state is also one of the few inclined to follow the rule of *Thorogood v. Bryan*, the court decided simply that "If deceased was blind so as to be unable to take care of himself, and of his own volition confined himself to the care of his father, the negligence of such custodian should be imputed to him; in such case he would be his agent."

The case of *City of Joliet v. Seward*, 86 Ill. 402, also turned on the question of agency.

The case of *Nesbit v. Town of Garner*, 75 Iowa 314, 39 N. W. 516, the remaining case relied upon by counsel, also turned on "the general doctrine that the principal is bound by the acts and conduct of his agent." And the court adds: "If [the principal] suffers an in-

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

jury through the negligence of another, but to which the negligence of his servant, or agent, while engaged in the business of his employment, contributes, there can be no recovery. But the relation of principal and agent must exist in fact."

Thus all the authorities except those based on the discredited case of *Thorogood v. Bryan*, relied upon by counsel, and cited to show that Abbitt and Lichtsin were engaged in a common enterprise, and each responsible for the negligence of the other, are shown on examination to be based on the relation of agency, and not upon an engagement in a common enterprise. But it is not even suggested that Lichtsin was the agent of Abbitt for any purpose, and indeed he was not.

Much has been said in the books, in a general way, as to persons engaged in a common enterprise, so that each should be responsible for the acts of all the others, but the illustrations given are few. One instance is that of a picnic party, the vehicle in which they rode being driven by one of the company. But there they had united in selecting him for that office, and he was in effect their agent for that work, and they were consequently responsible for his negligence as driver. And see *Beck v. East River Ferry Co.*, 6 Robt. (N. Y.) 82; also *Omaha, etc., R. W. Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599.

Wherever it is held that one person is responsible for the acts of another, as being engaged with him in a common enterprise, it will be found that the relation of agency, express or implied, exists. What is done by one is the work of all. This is so even in a criminal conspiracy, to which such joint enterprise is sometimes likened. The co-conspirator, the aider, abetter, accomplice, or accessory, are each engaged in doing their part toward the common wrong; and

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

each of them, in a manner, calls upon every other member of the conspiracy to bring about the result sought by all. It is a partnership in wrongdoing in which each member is at once principal and agent.

In the last analysis, every man is responsible for his own conduct solely. When it is said he is responsible for the acts of his agent, it is but to say that he has appointed the agent to take his place and act for him, and has thus assumed all responsibility for his appointee's acts. As said in the Iowa case, *Nesbit v. Town of Garner*, *supra*, "The relation of principal and agent must exist in fact."

But in the case at bar there was between Abbitt and Lichtsin no element of agency. They were fellow workmen, responsible only to their employer. To the employer, they had, as a part of their contract of employment, assumed the risk of one another's negligence. To the rest of the world they were independent; and no third person who should do either of them any wrong could shield himself by showing that the other was at fault: each was responsible for his own faults only.

Moreover, even if the instruction were correct as an abstract proposition of law, which it was not, it was certainly not applicable to the facts in this case. Abbitt and Lichtsin were car inspectors. One walked down one side of the train and the other down the other side, each examining the cars as they went along. When this service was ended, Abbitt, as required by his duty, went under the car to change the couplings. To enable him to see to do his work, Lichtstein stooped down and held his torch to give light to the man under the car. The evidence shows that both men when so engaged had a right to rely on the signals placed on the rear of the car, and to rely on every other employe in the station doing his duty.

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

No negligence whatever is shown on the part of either Abbitt or Lichtsin. The court at special term, therefore, rightly refused to give the instruction.

In Elliott's Gen. Prac., section 817, the author, in speaking of the fallacy of incomplete discrimination, says: "This form of the fallacy [applying a general rule to a particular case] often misleads counsel in the preparation of instructions, for, without justly discriminating differences, they state a general principle, correct in the abstract, but which does not fit the case in hearing. A rule may be relevant to one state of facts and entirely irrelevant to another state of facts."

But even more closely in point than any of the cases cited by counsel is *Kentucky, etc., Bridge Co. v. Hall*, 125 Ind. 220, where almost the exact question here discussed was before this court, and it was there held, that: In an action by an employe of a railroad company against another corporation for damages for personal injuries, it is not necessary to allege that the fellow servants of the plaintiff were not guilty of negligence contributing to the injury.

In the case at bar, as we have already seen, Lichtsin himself was not negligent. He was engaged in his duty, stooping down under the car and holding his torch so that Abbitt could see his work. The rule that applies to a traveler about to cross a railroad, has no application to a workman upon the road. While the latter must also use reasonable care, proportioned to the dangers incident to his work, yet his duty requires him to give his attention to this work. It is for that he is employed.

As said in *Shoner v. Pennsylvania Company*, 130 Ind. 170, so may we say of each of the inspectors in this case: "He was on the road rightfully, and in the discharge of duty, and while he was not absolved from

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

the necessity of being vigilant, and careful to avoid danger, he had a right to rely, also, to some extent, on the care and vigilance of others engaged in using the same road."

In *Kellogg v. Chicago, etc., R. W. Co.*, 26 Wis. 223, 7 Am. Rep. 69, it was held that, in the exercise of his lawful rights every person has a right to presume that every other will perform his duty and obey the law, and it is not negligence for him to assume that he is not exposed to danger which can only come to him through a disregard of law on the part of some other person. A like holding was made in *Brown v. Lynn*, 31 Pa. St. 510, 72 Am. Dec. 768, that a party is not bound to guard against the want of ordinary care on the part of another; he has a right to presume that ordinary care will be used. And in *Langan v. St. Louis, etc., R. W. Co.*, 72 Mo. 392, that, negligence is not imputable to a person for failing to look out for danger when under the surrounding circumstances he has no reason to suspect any.

In *Jordan v. Chicago, etc., R. W. Co.*, 58 Minn. 8, 49 Am. St. 486, 59 N. W. 633, it was held, that the rule that one is guilty of negligence who attempts to cross a railroad track without looking and listening, does not apply to the case of one who is employed in a railroad yard, and whose duties frequently make it necessary for him to go upon the tracks.

So in the *Indianapolis, etc., R. W. Co. v. Carr*, 35 Ind. 510, where it appeared that one Gill was at work upon a railroad track and, as in the case at bar, a train was backing, and the bell was ringing, and someone said "Look out!" when Gill, instead of stepping back, for some cause, stepped forward on the track, and was struck and killed. The court held that an instruction was properly refused which charged that if the de-

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

ceased might have seen the train by looking up it was his duty to do so; and if he failed to look up he was guilty of negligence. "He is not to be charged with negligence," said the court, "because he did not, when suddenly startled by the cry of danger, or by the near approach of the train, do exactly what one not exposed to such peril might think he might or ought to have done."

In *Bucklew v. Central Iowa R. W. Co.*, 64 Iowa 603, 21 N. W. 103, the supreme court of Iowa, in speaking of the rule requiring that one who is about to cross a railroad track is required to "stop, look and listen," well says: "Such rule should not be strictly applied to an employe who is engaged in making up trains which must, in a great measure, require his undivided attention. The traveler looks, listens and crosses the track, and his duty is ended. This is not so with an employe engaged in making up trains. For it is undoubtedly true that frequently several cars are to be uncoupled, and others coupled to the train. Considerable time is therefore required. If an employe so engaged were absolutely required to look and listen for approaching trains, or unexpected movements of the train in his charge, his usefulness would be greatly impaired. We think the question as to the duty of such an employe to look and listen for the movements of trains before he steps or walks on the track must be left to the jury to determine." Citing, *Ominger v. New York Central R. R. Co.*, 4 Hun 159; *Snow v. Housatonic R. R. Co.*, 8 Allen 441, 85 Am. Dec. 720; *Indianapolis, etc., R. W. Co. v. Carr*, *supra*; *Crowley v. Burlington, etc., R. W. Co.*, 65 Iowa 658, 20 N. W. 467.

Both Abbitt and Lichtsin, with the red lanterns hanging on the west end of the car under which they were working, had a right to rely on the usage which

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

made lanterns so hung markers to indicate that this was the end car of the train, and to warn all persons to refrain from running any car in contact with it. They had also a right to rely upon the extra red lantern placed on the rear platform as a danger signal, and that all persons handling cars in the depot would take notice accordingly.

In addition, the evidence shows that the brakeman was standing near by, watching until the inspectors should have changed the coupler, in order to give to the engineer of train 33 the signal to back up and couple the two rear cars. The inspectors could have no cause to believe that any other car was to be attached to that under which they were working; and still less to think that switchmen working in the same station would run a car upon their track, and couple to their train, without giving any notice or receiving any permission.

Neither Abbitt nor Lichtsin, therefore, was negligent; so that the instruction refused was inapplicable to the circumstances of the case, even if it were otherwise a correct statement of the law.

What is said by counsel for appellee in relation to other instructions is sufficiently covered by what is said above.

It is argued that by instructions given and refused, the court did not present to the jury the theory of appellee as to the duty of Lichtsin to keep a lookout for danger while Abbitt was under the car. Even if error was shown in the action of the court in this regard, it would be harmless, for the reason, as we have seen, that Lichtsin was not negligent, and because, even if he were, such negligence could not be imputed to Abbitt. Counsel make much of the circumstance that Lichtsin admitted, on cross-examination, that it was his duty to watch for danger, saying, "Yes, sir,

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

yardmaster that such a car was coming for Cincinnati. This was a very different thing from an order to couple to a train without asking the trainmen's permission. Yet, with all this, and with his experience in and around the Union Station, he ran headlong into the Vandalia sleeper, with sufficient force to lock the automatic couplers. That no custom justified this unlicensed coupling, appears from the fact that two cars, from two other roads, stood already, uncoupled, at the rear of train 33, to be coupled by backing up the engine of that train when its crew were ready to do so. At most, the telegram would have authorized the switching crew to run in the extra sleeper on the C., H. & D. track, and leave it standing there, with the two other uncoupled cars, to be coupled, by the C., H. & D. crew when it got ready.

The main contentions of appellee's counsel are thus shown to be without any substantial foundation. And, indeed, the principal opinion would appear to concede that appellee's argument is without merit, in so far as it seeks to uphold the decision of the general term of the superior court. But the majority opinion discovers material for reversing the decision of the special term, or trial court, in the concluding part of the fourth instruction given by the court. This does seem to me to be a most technical reason for overthrowing a meritorious judgment. Nor do I think that the instruction will reasonably bear any such construction as that placed upon it in the opinion. The part of the charge objected to amounts, as I think, to nothing more than saying to the jury: If you find from the evidence that a red light by night is known by railroad employes as a signal of danger; and if you find that such red light was placed upon the rear platform of the car under which Abbitt was at work, and was there seen by appellee's

Abbitt, Administratrix, v. Lake Erie and Western R. W. Co.

employees as they pushed up their car against it, and that they knew at the time that such light so placed was a signal of danger, then it was their duty to heed such signal and to act with care and caution in its presence, even though they did not know at the time what the particular danger was.

With all respect for the opinion of the majority of my brethren, I am quite unable to see that any adequate reason is given to show that this instruction does not state the law correctly. The opinion admits, as indeed the record clearly shows, that there was evidence to which the instruction was applicable, that is, that the red light so placed was a signal of danger, and was known to be such by appellee's employees at the time they ran their car against the one under which Abbitt was at work. Surely it is not the law that one who perceives a signal of danger is under no obligation to heed the signal and to act with care and caution when he sees it.

Nor is it any objection to the instruction that there was some evidence to the effect that a red light, so placed as this was, is not a signal of danger. The court plainly states the condition under which the instruction was given: "If you find from the evidence in this case, that a red light by night is a danger signal." There was evidence before the jury, evidence in super-abundance, to say nothing of common knowledge, that a red light at night is used as a danger signal. The court was, therefore, fully justified in giving the instruction, as thus applicable to evidence before the jury. If there was other evidence introduced that would justify the jury in finding that a red light so placed was not a danger signal, then it was the business of appellee to ask the court to give instructions applicable to its own theory of the case. Appellee has no right to object to the instruc-

Pittsburgh, etc., *B. W. Co. v. The Town of Crown Point et al.*

tion given, and which is fully and completely applicable to evidence before the jury. The very wording of the italicized part of the instruction, as copied in the principal opinion, is itself a complete refutation of all that is there said against its correctness.

I cannot avoid the conclusion that a grievous wrong has been done in seizing upon so slight a technicality to set aside the deliberate verdict of the jury and the judgment of the trial court.

McCabe, J., concurs in the dissenting opinion.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAIL-
WAY COMPANY *v.* THE TOWN OF CROWN
POINT ET AL.

[No. 18,105. Filed May 24, 1896.]

DEDICATION.—Adverse User.—Railroads.—Highways.—Lands appropriated to one public use are not, in the absence of statutory authority, subject to condemnation for another and inconsistent public use; but since a railroad company may voluntarily part with lands thus held, it may waive such protection, and thereby become estopped from setting up such right after the surrender of lands to the easement of a street or highway from adverse user. p. 547.

SAME.—Easement by Prescription.—Highways.—Municipal Corporations.—The application to cities and towns of the statute, section 5035, Burns' R. S. 1894, providing that a way used for twenty years as a highway shall be deemed a public highway, is not indispensable to the conclusion that ways used as streets for twenty years may become public streets from such use, as, strictly speaking, the doctrine of prescription does not apply to the acquirement of highways, but the user in the case of a street or highway, which, as between individuals, would constitute an easement by prescription, is evidence of a dedication or of a condemnation. pp. 547-551.

SAME.—Highways.—Presumption as to Dedication.—Municipal Corporations.—Where a way connecting two streets of a town has been in use by the public as a highway for thirty years; was ditched and graded by the authorities of the town, and cared for during such time in the same manner as other streets of the town were cared for; was so far regarded by the citizens and property owners as a public street that residences and business houses were constructed on the streets connected by it, without which such streets would

150	536
153	572
150	536
4154	23
150	536
165	131

Pittsburgh, etc., *R. W. Co. v. The Town of Crown Point et al.*

have had no outlet at their northern termini, and a livery stable was maintained near such way for years with its only entrance from such street, such facts raise the presumption of the dedication of such way to the public use. *pp. 551, 552.*

DEDICATION.—Highways.—Use by Owner.—Where the public used a way for travel for thirty years across lands belonging to a railroad company, and graded and cared for the way in the same manner that other streets and highways were cared for, the fact that the railroad company used the way in going to and returning from their depot would not affect the presumption that there was an intention to dedicate the way to the public. *pp. 552, 553.*

SAME.—Adverse User.—Disability.—Presumption.—Highways.—It will be presumed, in the absence of any showing to the contrary, that the owner of lands dedicated to the public as a highway was under no legal disabilities. *pp. 553, 554.*

SAME.—Adverse User.—Lease of Lands Dedicated.—The fact that lands were leased for a term of ninety-nine years, and were out of the possession of the owner, would not bar the acquirement by the public of an easement, by an implied dedication, in such lands for a street. *p. 554.*

STREET IMPROVEMENTS.—Action to Enjoin Collection of Assessments.—Municipal Corporations.—An action to enjoin the collection of assessments made against property owners for street improvements is a collateral attack upon the proceedings of the town board, and can be maintained only by the affirmative disclosure of some act or omission rendering the assessments invalid for the want of jurisdiction, and it cannot be sustained for any mere irregularity in the proceedings. *p. 554.*

SAME.—Petition by Property Owners.—Street improvements are authorized upon a vote of two-thirds of the membership of a board of town trustees without a petition by the abutting property owners. *p. 554.*

SAME.—Ordinance.—A recital in an ordinance for street improvements that the same was passed by a two-thirds vote of the board, amounts to a finding upon such fact, and is conclusive against a collateral attack. *p. 555.*

From the Lake Circuit Court. *Affirmed.*

N. O. Ross and G. E. Ross, for appellant.

C. N. Morton and J. W. Youche, for appellees.

HACKNEY, C. J.—The appellant sought to enjoin the appellees from constructing a pavement upon certain ground claimed by the appellant to belong ex-

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

clusively to it, and as forming a part of its depot and station grounds at Crown Point.

The case was tried by the court and resulted in a special finding of facts, with conclusions of law stated and excepted to, and a judgment in favor of the appellees. There is no question but that the fee in the way in dispute is in the appellant, but the points of contention are as to whether the way became a public street by user or by dedication, and whether the proceedings of said town for the paving of said way were valid.

The facts specially found are substantially as follows: In the year 1865, the then owners of the land, duly laid out and platted the same as Railroad addition to the town of Crown Point; which plat was duly acknowledged and recorded, and which territory is now and ever since has been within the corporate limits of said town. At about the same time the Chicago & Great Eastern Ry. Co. located and constructed its railroad in the middle of its right of way through said Railroad addition, said road running diagonally through said addition in almost an exact northwesterly and southeasterly direction. The width of said right of way from the point where said road enters said Railroad addition for a distance of about 400 feet along said line of road in a northwesterly direction is 50 feet on each side of the center of the track; from this point on, along said line of railroad, for a distance of about 1125 feet, the width of said way is increased to 150 feet on each side of the center of said track, and from thence on through said addition it is again only the width of 50 feet on each side. Goldsborough street in said addition runs from west to east to and beyond said widened part of appellant's right of way, but not over the same; and Jackson street runs from south to north to and beyond,

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

but not through, said right of way. At the time said railroad was so constructed, said company located its depot at Crown Point on the southwesterly side of its tracks upon said widened part of said right of way in said Railroad addition, at a point nearly on a line with Goldsborough street extended east, and Jackson street extended north. Said depot was a large frame structure, close to the main track, and extending southwestwardly therefrom about 40 feet. During the year 1865 the owners of the land upon which Railroad addition was afterwards located, conveyed to said railroad company, by deed, the said strip of land through said addition, along which said railroad was located, including the widened part thereof, and afterwards appellant acquired the legal title to said right of way and to said widened strip of land in said addition. Soon after said railroad and depot were constructed, and not later than 1866, said company built and for many years thereafter maintained an elevated walk alongside and to the rear of said depot building, extending forty or fifty feet beyond each end thereof, about 100 feet in length, and running parallel with said railroad track, and was used in connection with said depot, separating it from the depot ground lying to the rear thereof. Said depot and walk existed and were maintained by said railroad company from the year 1865 or 1866 until about 1886, when they burned down; and thereupon said company constructed a new depot upon nearly the same site, and said latter building still remains. Said railroad, with its switch, sidetracks, depot and freight house, are now as they have existed since 1886. Shortly after said railroad was constructed, said Goldsborough street, and also Jackson street, began to be and were used extensively and constantly by the public generally for travel and passage in such man-

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

ner as public streets are ordinarily used. During the year 1866, the public in traveling and passing north on said Jackson street, were in the habit of passing north on the line of said street, extended, to the rear of said depot building, and from thence west in a straight line to said Goldsborough street; and they likewise traveled and passed along said Goldsborough street, extended, to the rear of said depot, and to the line of Jackson street, extended, and thence south to and upon said Jackson street; and during said year the route so used by such travel became well worn and marked; and such travel was constantly substantially upon the same route, without material deviation therefrom, and continued along the same during 1865, 1866 and 1867. During the year 1867 the town marshal of Crown Point, who then had supervision of the streets of said town, in his official capacity caused said route of said travel to be graded, worked, and improved as a public street of said town, by digging ditches on each side thereof and throwing the excavated earth between them, thus forming an elevated roadway, which roadway was so constructed by him from the east end of Goldsborough street, eastwardly, in the rear of said depot, to the north end of Jackson street, substantially upon the route of travel which had been before that time so used by the public; which said roadway was situated wholly upon said depot ground, to the rear and alongside of said depot and walk, and formed a connecting roadway between said streets. From 1867 until the commencement of this suit said roadway was constantly and continuously maintained, substantially upon said place and route, and during each of said years was worked and improved its entire length to the width of 30 feet by the public authorities of said town, at public expense, as a street of the town of Crown Point, said work consisting of

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

ditching alongside of said roadway and scraping the earth towards the center thereof, and maintaining an elevated roadbed or grade suitable for public passage or travel with all kinds of vehicles; and during all of said time the streets and roads of said town in the neighborhood of said roadway in controversy were usually worked upon and improved by the public authorities of said town twice each year, in the spring and fall; and during said time said roadway in controversy was worked, improved, and treated by the public highway authorities of said town the same as other streets of said town in that neighborhood, and there was not a single year since 1867 during which no road work was done by the public authorities of said town upon said roadway in controversy. Beginning with the year 1866, the public has constantly, continuously, and without interruption used the said roadway, so constructed as aforesaid, for public travel in all the ways in which public streets are ordinarily used therefor; much of said use during all of said time consisting in daily travel of persons coming from the south along said Jackson street and going to the said depot to transact freight and passenger business there, and also by persons coming along said Goldsborough street and going east thereon for said like purpose to said depot, but a large amount of the travel on said roadway was by persons daily, during all of said time, in passing north on said Jackson street to said Goldsborough street, and east on said Goldsborough street to Jackson street, and in so doing, passing over said roadway in controversy, without going to or having any business with the said railroad company, or at said depot; but said company or its predecessors have done no affirmative act, aside from acquiescence, to establish said way as a street. Said roadway in controversy has continuously, during the past thirty

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

years, been one of the most constantly and frequently used roadways of said town, and the public travel upon, along, and over said roadway has so continued without interruption, and has been in daily use by the public for public travel thereon from the year 1866 to the commencement of this action, and during all of said years it has been the ordinary and most frequently used route of travel between Goldsborough and Jackson streets, and to and from said depot, the said streets being the routes to reach the same; such travel has been open, notorious, and visible, and the work and improving done has been likewise open, notorious, and visible, and the station agents of appellant and all its predecessors in title and ownership, have constantly had full notice and knowledge of said travel and improvement, but neither appellant nor its predecessors have ever prevented or attempted to prevent, or made any objections to the public improvement or public use of said roadway for travel as aforesaid. From 1865 to 1870 that part of railroad addition lying on each side of said right of way and depot grounds was mostly built up and improved as urban property, and dwelling houses and business buildings were erected by their owners upon all the lots on each side of Goldsborough street, and also on Jackson street, all of which buildings and improvements still exist. About 1866 a large livery barn or stable was built upon lots 5 and 6 in block 17 in said addition, facing upon the said roadway, and the same was from that time on, with some interruptions, used to carry on the livery business, and during all of said time the only access to and from said livery stable was upon, along and from the said roadway in controversy, and the residents and people owning and doing business in the buildings along said Goldsborough and Jackson streets have constantly used said road-

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

way in passing to and from their said residences and places of business on said streets. Neither appellant nor any of its predecessors either built or maintained any fence or other enclosure around its said depot grounds, but since 1866 or 1867 a fence has been maintained by the owner of said lots 5, 6, and 7, in block 17, in said addition, parallel with and along the southwesterly side of the said roadway in controversy, as so located and traveled as aforesaid. That since 1866 until the commencement of this suit, the public road authorities of said town have constantly claimed and believed that said roadway was one of the public streets of said town, and under and with that belief the public road work was by them done on said roadway as aforesaid. Since said time said roadway has been used for public travel without asking the permission of appellant or any of its predecessors, but such public use has been adverse to the rights of appellant and its predecessors, and under a claim of right. Said appellant did not, nor did any of its predecessors, ever use or attempt to use the place where said roadway is located for railroad purposes, except that its servants, as a matter of convenience in going to and from their work at the depot, used the same as the rest of the public did; and that said roadway in no manner interferes with the operation, use or necessities of the appellant in the operation of its railroad. All side and switch tracks of said railroad are and always have been located upon the easterly side of the main track thereof, and appellant has an abundance of room and ground outside of the limits of said roadway to accommodate all its railroad uses and purposes, and to transact its railroad business at present; that said roadway accommodates public travel in said town, as well as the public access to and from appellant's depot, and in no

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

way interferes with the use of said railroad or depot. While said appellant and its predecessors did not actually have the subjective intent to dedicate, yet they have so acquiesced in the use of the way, with a knowledge of all the facts aforesaid, and with the result that the town authorities have in good faith made the improvements aforesaid, and expended their money therefor, that in justice and good conscience appellant ought not now to be heard to aver its want of intent to dedicate, but it should be charged, as against said town and the public, with an intent to dedicate. The court finds as an inference of fact, from the facts aforesaid, that the way and place in controversy, at the commencement of this suit, had become and was one of the public streets of said town of Crown Point.

The court further finds that on the 5th day of February, 1894, the board of trustees of the town of Crown Point met in regular session at the town hall, with all members present, and ordained that the public street and highway extending from Jackson to Goldsborough street be named and known as "Railroad street," and declaring an emergency. The court further finds that what is termed Railroad street in said ordinance, is the strip of land or highway in this case, and that the same now is, and for more than twenty-five years last past has been, within the limits of the said town of Crown Point; that on February 12, 1894, the board of trustees of said town met in special session, all members being present, and by a two-thirds vote passed an ordinance for the grading and paving with cedar posts to the width of 21 feet numerous other streets, and also Railroad street from Jackson to Goldsborough, declaring such improvement necessary; that the cost thereof be assessed against and collected according to the provisions of the act

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

of March 4, 1889; that said improvement should be made under the supervision and to the satisfaction of the board of trustees and the civil engineer of said town, and in accordance with the plans and specifications on file in the office of the town clerk; ordering said clerk to give ten days' notice of the passage of said ordinance to property owners along the line; to reduce any objection to the necessity for the construction to writing, and file same with said clerk by 7 o'clock p. m. on March 26, 1894; providing that said clerk shall advertise for three successive weeks that sealed proposals, with bond, will be received up to 1 o'clock p. m. of May 1, 1894, and will be opened and passed upon at a special meeting held May 5, 1894; ordering the civil engineer of said town to set proper grade stakes, prepare profile showing correct grades, excavation, location, depth and size of drains, etc., declaring an emergency. The court further finds that said clerk and civil engineer, in accordance with the requirements of said order, did the things therein required of them in the manner so directed. That on April 2, 1894, said board of trustees met in regular session with all members present, it being shown to their satisfaction that said clerk had given the required notice to property owners to reduce their objections to writing and file the same on or before 7 o'clock p. m. of March 26, 1894, no such objections having been filed, said board was still of opinion that public necessity required such improvement. On May 5, 1894, said board met in regular session, with all members present, it appearing to their satisfaction that the required notice had been given for bids for the construction of said work, the propositions of various bidders were received and considered, and appellee, Garden City Paving and Post Company, mak-

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

ing the lowest and best bid, in proper form, and being accompanied by the proper bond, same was accepted, and said company ordered to enter into a contract with said town in fifteen days from said date; which contract was made and entered into by said board, in special session, with all members present, on May 15, 1894, at the price of \$1.40 per square yard, which contract was in writing and signed by both parties. On August 29, 1894, said board met in special session, with two of their members present, and the town engineer filed his final report and estimate of the cost of the pavement of Railroad street, as theretofore ordered, and it appearing that the work on said street was complete, it was accepted by said board, and said estimate was referred to a committee on streets and alleys, which committee was ordered to meet at the town hall of said town at 7 o'clock p. m., September 14, 1894, to consider the same; said town clerk was ordered to give the proper notice of the meeting of said committee, at said time, where a hearing could be had; which said notice was duly given. That at said meeting, at said time and place aforesaid, the appellant came and filed its written objections to the assessments made against it. On September 24, 1894, said board met in special session, all members being present, and said committee on streets and alleys aforesaid made their report, wherein they found, that after hearing all objections and recommendations and viewing said improvement, said estimate and report of said engineer correct in every respect and recommending its adoption and confirmation, all of which was done by said board of trustees, and said report was confirmed and approved; and it was further ordered by said board that the amounts stated in said final estimate be assessed against the several lots and parcels of land described therein, for and on account

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

of said improvement, and how the same should be paid and collected.

One proposition relied upon by the appellant is that, having appropriated land to its right of way and station grounds, no power existed to take, by direct proceedings, any part thereof laterally for a street or public highway, and that, therefore, no right existed to take the same indirectly, as by user or estoppel. It is not doubted that lands appropriated to one public use are not, in the absence of special authority, subject to condemnation for another and inconsistent public use. This case, however, presents no question at variance with this doctrine. The question here is, can a railroad company, holding property for the uses of a railway, part with the same for another public use? That it may do so by express grant is not doubted; that the doctrine urged is for the protection of the holder of the first public use is certain; that the railroad company may waive this protection seems equally certain; and if it may, just why the company is not bound by the principles of waiver and estoppel under which the individual may surrender his lands to the easement of a street or highway arising from adverse user, it is difficult to see. That one public use may be lost by user or dedication to another has been directly decided. *Board, etc., v. Huff*, 91 Ind. 333; *Easley v. Missouri-Pac. R. W. Co.*, 113 Mo. 236, 20 S. W. 1073; *Turner v. Fitchburg R. R. Co.*, 145 Mass. 433, 14 N. E. 627.

It is insisted also that a street or public highway cannot be established by prescription in an incorporated town or city, citing *Tucker v. Conrad*, 103 Ind. 349; *Shellhouse v. State*, 110 Ind. 509; Elliott on Roads and Streets, p. 138. These authorities have reference to the application of the statute, section 6762, Burns' R. S. 1894 (5035, R. S. 1881), which provides

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

that a way used for twenty years as a highway shall be deemed a public highway, and the county commissioners may cause it to be described and recorded. The application of this statute to cities and towns is not indispensable to the conclusion that ways used as streets for twenty years may become public streets from such use. There is confusion in the cases, from treating the question of such use in some instances as constituting a way by prescription, and in others as by dedication or by condemnation. Strictly speaking, the doctrine of prescription does not apply to the acquirement of highways. That doctrine has as its foundation the presumption of a grant from the adverse user, and, when applicable, must involve parties capable of making and receiving grants. Where doubts have been expressed as to the application of the doctrine to streets or highways, independent of statute, it has been from the conclusion that the inhabitants of a municipality, those whose use was set up as constituting the right, could not occupy the position of a grantee, as in the case of an individual whose use of a private way may be asserted to constitute an easement by prescription. However, we have no doubt, that, strictly speaking, the user, in the case of a street or highway, which, as between individuals, would constitute an easement by prescription, is evidence of a dedication or of a condemnation. In other words, that which is a prescriptive right, as between those capable of granting and receiving title, is, as between the fee owner and the public, sufficient to raise the presumption of a dedication or a condemnation.

In Angell on Highways (3d ed.), p. 142, it is said: "Prescription, in its more general acceptation, is defined to be 'a title, acquired by possession, had during the time and in the manner fixed by law.' It is

Pittsburgh, etc., *R. W. Co. v. The Town of Crown Point et al.*

also said that 'a prescription by immemorial usage can, in general, only be for things which may be created by grant; for the law allows prescriptions only to supply the loss of a grant.' Now, inasmuch as the public cannot take by grant, prescription, in its strict sense, has no application to highways. 'As the law now exists in this State,' says Senator Furman, in *Post v. Pearsall* [22 Wend. 444], 'and as it has in substance existed ever since the formation of our constitution, the only way that an individual can acquire a right in real estate is by grant, or by an adverse possession of twenty years under a claim of title, in which case the law presumes a grant; and as to the public, the only way in which they can at the common law acquire an easement in the lands of another is by dedication.'" After referring to cases applying the doctrine of prescription to highways, the author continues, "But, more properly speaking, such use, unless by virtue of some statute, is but a fact from which a dedication to the public may be presumed." In *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662, Shaw, C. J., speaking for the court, said: "We think it clear upon principle, that public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption from such enjoyment, that they were, at some anterior period, laid out and established by competent authority." See also Pratt's Law of Highways, p. 36; Tiedeman on Real Property, section 599. and authorities there cited.

Judge Elliott, in his *Roads and Streets*, p. 133, applies the doctrine of prescriptions to roads and streets, but concedes the doubt of its strict applicability. He denies that the presumption at the foundation of the doctrine is of a grant, when applied to highways, and insists that the presumption is that the way has been "laid out and opened by competent authority."

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

The difference seems to exist in the presumption to be drawn from the application of the rule to public highways, and not upon the conclusion that the facts which constitute, as to private easements, a way by prescription are accepted in favor of the public and as precluding the owner of the fee from denying the continued use of the way as constituting a public street or highway.

We are to look, therefore, to the facts found to determine whether they authorized a legal conclusion in favor of the appellee on the presumption of a dedication or condemnation. By adverse use alone, the period, it is conceded, must be twenty years, but, it is also conceded, a dedication may be presumed from circumstances, continuing for a much shorter period. There is no disagreement as to the elements constituting adverse user, that it must be by conduct clearly indicating a claim of right, that it must be exclusive, that it must be continuous, with the knowledge of the owner, and without interruption from him.

A common law dedication, or the presumption in favor of dedication or condemnation, operated by way of estoppel *in pais*. Elliott's Roads and Streets, p. 87; Dillon's Municipal Corp., section 628; *City of Cincinnati v. White*, 6 Peters 431; *Faust v. City of Huntington*, 91 Ind. 493.

There is here no claim to an express dedication, and the facts are to be viewed with reference to an implied intention to dedicate. Of the question of intention, Judge Elliott says, Roads and Streets, p. 92, "The intent which the law means is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose. If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to the public use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent." See, also, *Pittsburgh, etc., R. W. Co. v. Nofstger*, 148 Ind. 101. On p. 95 of the same work, it will be seen that the negligence of the owner, having the same effect, is sufficient to work the estoppel supporting the presumed dedication.

The question of an acceptance by the public of the way, has been discussed with reference to its influence upon the conclusion that a dedication will be presumed. Whether that question is of importance, except to determine the duty of the corporation to repair, is of no consequence, since, if essential to a complete dedication, there can be no doubt, upon the findings, of an acceptance.

The findings show unmistakably an uninterrupted use by the public for thirty years, of a well defined way of thirty feet in width, connecting Goldsborough and Jackson streets, through and over the appellant's land. The way was defined by ditching and grading, it was accepted and recognized as a public way, not only by the thirty years of constant travel, but by the action of the town authorities in grading, ditching, and caring for the same, twice each year, in the man-

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

ner of caring for the streets of said town. It was so far regarded by the citizens and property owners as a public street, that residences and business houses were constructed upon Goldsborough and Jackson streets, which streets, but for the way in question, would have had no outlet at the northern terminus of either, and for thirty years a livery stable was maintained upon lots adjacent to appellant's land, with its entrance upon the way in question. The use of said way, the grading, ditching and care of the same, the construction of buildings with reference to such way, and its use as a public street were with never an objection or question from the appellant.

Counsel for appellant insist that inasmuch as the way was used also by persons having business at the depot, and by the employes of the company operating the railway in going to and returning from their employment, the use of the public, disconnected from the use for railway purposes, was not exclusive. It seems to push the rule of exclusive use too far to require that the owner of the fee may have no part in the use to sustain a dedication or a way by prescription. The case of *Pennsylvania Co. v. Plotz*, 125 Ind. 26, cited by counsel, holds that "one who devotes a portion of his land for use as a way of travel for his own convenience and accommodation, will not be deemed to have dedicated it to the public simply because the public also use the way with the landowner's permission." Permission certainly means more than acquiescence, for, to sustain prescription, it must appear "that the owner acquiesced in such use." *Norlin v. Whipple*, 120 Ind. 596, and authorities there cited.

One of the strongest evidences supporting an implied dedication is when the owner constructs the road for the use of the public. If concurrence in the

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

use would defeat dedication, it would seem also that the more useful the way to the fee owner, and the more extensive his use of it, the less certain an intention to dedicate, and having constructed the road that it might be more useful would be strong evidence that he did not intend to dedicate it to the public. Any use of the way here in controversy by the appellant was not antagonistic to the public use claimed, but was of the same character and consistent with it.

When we get back to the primary question, in determining whether a way has become a public road or street by dedication, we must ascertain the intention of the owner. To ascertain that intention we look to his acts and his omissions, and their effect upon those who have relied upon them. As long as the public maintained a graded and well drained way over the appellant's ground, supplying a good street for those who might go to the depot on business with the company, the appellant was willing to quietly accept the labor and expense bestowed, but, after thirty years of such benefits, bestowed in the belief that the way was a public street, would it not constitute a wrong to permit the appellant to deny that the way was such public street? Does the fact that such company enjoyed the benefits of the improved way affect the conclusion that there was an intention to dedicate? These questions suggest their own answers.

It is urged also that it was not found that the adverse use was while the owner was free from disabilities and in a position to resist such use. Disabilities are not, in the first instance, presumed, and the appellant instituted this suit to enjoin public officers from performing official acts, such acts always being favored with the primary presumption of regularity and legal support. In the absence, therefore, of any finding on the subject, presumptions would be in-

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

dulged against the appellant. See *Faust v. City of Huntington*, 91 Ind. 493.

Nor do we observe any force in the proposition that the evidence showed that during a part of the period of adverse user the owner of the land was out of possession, and the railway was operated by a tenant under a lease for ninety-nine years. Such a tenancy can certainly be no bar to an acquirement by the public of an easement by implied dedication. It could not preclude a condemnation, and certainly would not repel the presumption of an ancient dedication.

By supplemental complaint it was shown that the proposed paving had been completed, and it was sought to enjoin the collection of the assessment against the appellant. This constituted a collateral attack upon the proceedings of the board of trustees, and, under the well established rule, can be maintained only by the affirmative disclosure of some act or omission rendering the assessment invalid for the want of jurisdiction, and it cannot be sustained for any mere irregularity in the proceedings. *McEneney v. Town of Sullivan*, 125 Ind. 407; *DePuy v. City of Wabash*, 133 Ind. 336; *Robinson v. City of Valparaiso*, 136 Ind. 616; *City of Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 246; *Kizer v. Town of Winchester* 141 Ind. 694.

The infirmity, in such case, must be disclosed by the record. *DePuy v. City of Wabash*, *supra*; *Shoemaker v. South Bend, etc., Co.*, 135 Ind. 471; *Bailey v. Rinker*, 146 Ind. 130; *Thompson v. Harlow*, *ante*, 450.

One objection urged against the proceedings of the board is that they do not appear to have been had upon petition by property owners. Petition is not indispensable, as such improvements are authorized, upon a vote of two-thirds of the membership of the board, without a petition. *McEneney v. Town of Sullivan*, *supra*; *DePuy v. City of Wabash*, *supra*.

Pittsburgh, etc., R. W. Co. v. The Town of Crown Point *et al.*

It is further objected that the recital in the ordinance directing the improvement, that the same was passed by a two-thirds vote of the board, was not evidence of the fact of such vote, and was an insufficient record of the fact. It has been decided that such a recital amounts to a finding upon the question, and that such finding is conclusive. *City of Indianapolis v. Consumers Gas Trust Co.*, *supra*, and authorities cited. See, also, *Balfe v. Lammers*, 109 Ind. 347, where it is held that the question as to whether the yeas and nays were taken can only be made by appeal, or direct attack.

The ordinance directing the improvement included several streets, and the street here in question was described as "Railroad street," extending from Jackson street to Goldsborough street. Prior to the passage of said ordinance, another ordinance had been passed declaring that the street or way extending from Jackson street to Goldsborough street be named and known as "Railroad street." No other street extended from one of the named streets to the other. The findings and evidence particularly locate and describe this street. It is now urged that in the proceedings for the improvement of Railroad street there was no means of knowledge by property owners or bidders, of the proposed improvement. The general description, under the circumstances, was sufficient.

Other questions as to the letting of the contract; that the price at which it was let was so much per square yard; that the letting was in connection with other streets, etc., have been urged. All of these we regard as not presenting any question going to the validity of the action of the board, and, at most, but irregularities, subject only to direct attack.

It is insisted also that the evidence in numerous re-

Wintrode v. Renbarger.

spects does not sustain the findings of the court. We have examined the evidence, and are of the opinion that it fairly supports each finding questioned.

No error appearing on the record, the judgment is affirmed.

WINTRODE v. RENBARGER.

[No. 18,296. Filed May 24, 1898.]

PLEADING.—*Answer.*—*Form of Demurrer.*—A demurrer to an answer as not stating facts "sufficient to constitute a good answer to the complaint of the plaintiff," does not question the sufficiency of the answer as stating a cause of defense. *p. 557.*

SLANDER.—*Complaint.*—*Neglect of Official Duty.*—Words, charging that a sheriff neglected, mistreated, and starved prisoners in his custody, impute the commission of a crime, and are slanderous. *pp. 557, 558.*

SAME.—*Justification.*—*Rule as to Evidence.*—Prior to the act of March 4, 1897 (Acts 1897, p. 187), it was necessary that a plea justifying the speaking of words imputing the commission of a crime be supported by evidence establishing its truth beyond a reasonable doubt. *p. 559.*

From the Huntington Circuit Court. *Reversed.*

J. B. Kenner and U. S. Lesh, for appellant.

O. W. Whitelock and S. E. Cook, for appellee.

HACKNEY, C. J.—Suit by appellant for slander. Trial and judgment for appellee. First and third assignments are that the trial court erred in overruling demurrers, respectively, to the second paragraph of answer to the first paragraph of complaint, and the second paragraph of answer to the second paragraph of complaint. The record fails to disclose the filing of demurrer to or any ruling upon the second answer to the first paragraph of complaint, and, therefore, presents no basis for the first assignment of error.

The second paragraph of complaint went out of the record upon demurrer, as did any answers thereto, and the record discloses the filing, on three occasions,

Wintrobe v. Renbarger.

of an amended second paragraph of complaint. The third assignment does not question a ruling upon demurrer to the second answer to the amended second paragraph of complaint, and, therefore, presents no question for review. The only demurrer in the record to which the assignment could possibly apply was for the reason that facts were not stated "sufficient to constitute a good answer to the complaint of the plaintiff."

On the authority of *Young v. Warder*, 94 Ind. 357, this form of demurrer would not question the sufficiency of the answer as stating a cause of defense.

Several questions arising upon the motion for a new trial are best considered by reference to the pleadings. The appellant was sheriff, and had the custody of the county jail and of the prisoners confined therein, and the first paragraph of the complaint charged the appellee with speaking the defamatory words, concerning the appellant, "You are starving men to death in jail," and, by innuendo, it was alleged that appellee meant to charge appellant with a felony in attempting to murder prisoners by starvation.

The amended second paragraph of complaint charged the appellee with speaking, in one specification, the same words alleged in the first paragraph, as a neglect of official duty, and, in another specification, the additional words: "Yes, you are keeping the jail a d—d sight worse than Libby Prison," with the following innuendo: "meaning and intending to charge that the plaintiff, as keeper of the county jail, was torturing and starving and maltreating the prisoners under his charge, and violating his official duties to provide for them food, as the law requires him to do; and he further avers that the false and defamatory phrase referring to Libby Prison, was meant the prison that was known during the war of the rebellion

Wintrobe v. Renbarger.

as Libby Prison, and which was reputed to be, as a historical fact, and understood by the people generally that such prison was being so conducted during the years of the war that prisoners of war imprisoned there were not fed sufficient food, and that the quality thereof was bad, insomuch that the prisoners died of scurvy, and that they were starved and shot on the merest pretenses by the persons in control thereof." The issues were joined by answers in denial, and in justification, and by replies in general denial.

With reference to the plea in justification of the charge alleged in the second paragraph of complaint, the court instructed the jury that the burden rested upon the appellee to establish said plea "by a preponderance of the evidence." An instruction asked by the appellant, and refused by the court, was to the effect that the plea in justification should be established "beyond a reasonable doubt."

Appellant insists that since the plea justified the speaking of words imputing the commission of a crime, the degree of proof necessary to sustain the plea was not a mere preponderance, but was by evidence establishing it beyond a reasonable doubt.

The court in its summary of the issues expressly treated the first paragraph of complaint as charging words imputing the commission of a crime, and, we have no doubt, each paragraph did charge words imputing to the appellant the commission of one or more crimes.

As the charge given related to the justification of the second paragraph of the complaint, it is sufficient to say that under section 2105, Burns' R. S. 1894, it is made a crime to neglect the performance of any official duty in the manner and within the time prescribed by law, and that the words charged at least imputed this crime.

Wintrode v. Renbarger.

In this State, at the time this cause was tried, it was the rule that a plea justifying the speaking of words imputing the commission of a crime must be supported by evidence establishing its truth beyond a reasonable doubt. *Fowler v. Wallace*, 131 Ind. 347, and numerous decisions there cited.

Counsel for the appellee insists that the rule should apply here that where an instruction is correct as far as it goes, but does not comprehend the full scope of the question, objection will not be heard, but that the complaining party is required to tender a fuller instruction. This insistence is upon the theory that the court, not having indicated the degree of preponderance essential, did not err. This position we think untenable. It is manifest from the instructions given, as well as from that refused, that the court did not accept the rule that proof beyond a reasonable doubt was required, and that it was deemed sufficient if supported by a mere preponderance.

The question is one as to the *quantum* of proof, the degree to which the mind should be convinced. Other questions, principally as to the admissibility of evidence, have been discussed, and some of them indicate that the scope of the issues was not clearly understood by the court and counsel.

This appeal has probably suggested amendments to the pleadings and such changes of issues as will render it unnecessary that we should pass upon such other questions. For the error indicated the judgment is reversed, with instructions to sustain appellant's motion for a new trial.

Close, by Next Friend, v. Pittsburgh, etc., R. W. Co.

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**CLOSE, BY NEXT FRIEND, v. PITTSBURGH, CINCINNATI,
CHICAGO AND ST. LOUIS RAILWAY COMPANY.**

[No. 18,338. Filed May 24, 1898.]

APPEAL.—*How Extrinsic Matters Made Part of Record Without Bill of Exceptions.*—To make matters outside of the record a part thereof by order of court instead of bill of exceptions, such extrinsic matters must be set out in the order. *pp. 560-564.*

SAME.—*Presumption.*—It will be presumed on appeal that the circuit court in all things conformed to and complied with the law. *p. 565.*

From the Scott Circuit Court. *Affirmed.*

Oscar H. Montgomery and *Joseph H. Shea*, for appellant.

Simeon Stansifer, for appellee.

MCCABE, J.—The appellant sued the appellee in a complaint of three paragraphs, to recover for a personal injury to a minor, at the crossing of appellee's railway by a public highway, caused, as is alleged, by the negligence of appellee.

The appellee filed certain interrogatories to the appellant, which were answered by him. Upon these interrogatories and their answers appellee moved to reject the complaint, on the ground that said complaint was false, and, therefore, a sham pleading, according to section 386, Burns' R. S. 1894 (383, R. S. 1881). The circuit court sustained said motion, rejected all three paragraphs of the complaint, and afterwards dismissed the cause for want of a complaint. Upon this action of the circuit court, alone, error is assigned here by appellant.

After stating that said motion was sustained, and plaintiff's exception thereto, the record reads thus: "And it is now ordered by the court that defendant's motion to dismiss this action, the interrogatories propounded by defendant to plaintiff, and plaintiff's

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Close, by Next Friend, v. Pittsburgh, etc., R. W. Co. .

answers thereto, the court's ruling on said motion and defendant's exceptions to such ruling and all entries with respect to said motion, interrogatories, answers, ruling, and exceptions be made a part of the record of this cause without a bill of exceptions, which motion, interrogatories, answers, ruling, and exceptions are in the words following, to wit: here follow interrogatories as set out heretofore in this transcript at pages 15 to 25 inclusive; and answers thereto as set out herein at pages 26 to 33 inclusive; and motion by defendant to dismiss as appears herein at page 36; the court's ruling sustaining said motion as contained herein at page 37; the exceptions of the plaintiff to the ruling of the court as noted herein at page 38."

The matters sought to be made a part of the record by the order above quoted are manifestly no part of the record, unless made so either by bill of exceptions or order of court. The bill of exceptions is of statutory origin as the order of the court by which matters not a part of the record are incorporated into it or added thereto. The matters mentioned were not made part of the record by bill of exceptions. So that if they are a part of the record, it must be so because they have been made so by the order mentioned. The above order obviates the defect in the order for which it was held in *Russ v. Russ*, 142 Ind., at p. 474, that the extrinsic matter there involved had not been brought into the record. The order there was as follows: "And the court having heard said motion, overrules the same, to which ruling of the court, the defendant at the time excepts, and the same is now ordered to be made a part of the record." It was held there that such order was too indefinite as to the particular matters intended to be incorporated into the record. But there was another defect in the order there, as

Close, by Next Friend, v. Pittsburgh, etc., R. W. Co.

there is here, and which we did not there mention, that rendered the order ineffective to make the matters referred to therein a part of the record, namely, the matters sought to be incorporated into the record by such order are not set out in the order. The section of the code on the subject provides that: "All proper entries made by the clerk, and papers pertaining to a cause, and filed therein (except a summons for the defendant, where all the persons named in it have appeared to the action, and summons for witnesses, depositions, and other papers which are used as mere evidence) are to be deemed parts of the record; but a transcript of motions, affidavits, and other papers, when they relate to collateral matters, and depositions and papers filed as mere evidence shall not be certified, unless made a part of the record by exception or order of court and directed to be certified by appellant. * * * Every paper and pleading above excepted may be made a part of the record by exceptions or order of the court on motion." To make matters outside of the record a part thereof by order instead of bill of exceptions, in the very nature of the transaction, the added matter must be spread upon, or written into the record. That can only be done by setting such matter forth in the order. Otherwise, this court could never tell what extrinsic matter had been added to or incorporated in the record. Before the extrinsic matter can become a part of the record by such an order it must be designated in the order at *least*, as all must admit. And if the extrinsic matter is simply designated or named in the order, without setting it forth therein, then something has been named or designated that is yet still remaining outside of the record that is by virtue of such order to become a part of the record. And who is to be the judge of what foreign matter is to go into

Close, by Next Friend, v. Pittsburgh, etc., R. W. Co.

the record under the order? The judge alone who makes the order is clothed with the power to decide what specific and particular extrinsic matter shall go in under the order. But if that thing is not set forth in the order, then the right of the judge to determine what extrinsic matter shall go in under such order is taken away, and such judicial function is left to be performed by the clerk. That cannot be done in any case. This is so, because if the order merely designates the extrinsic matter, without setting it forth in the order, the clerk alone is left to say what shall go in under the order, even though such foreign matter may appear elsewhere in the transcript. But when such matter is set forth in the order, making it a part of the record, the judge alone determines what shall go in under the order. But here it appears that the extrinsic matter is referred to in the order, designating the pages of the transcript where such extrinsic matters have been copied into the transcript. Those matters confessedly not being a part of the record, a mere reference to them has no greater effect than if they had been copied into some other document, book, or paper, and referred to, even if such a reference would make them a part of the order, if they were legitimately a part of the record at the places in the transcript where they are copied. But there is no authority for making extrinsic matter a part of such an order of court as there is in case of a bill of exceptions by a direction to (here insert). The only authority for making extrinsic matter a part of the record by order of court generally is the section above quoted. A very different section provides for incorporating certain matters into a bill of exceptions by a direction to (here insert). Section 638, Burns' R. S. 1894 (626, R. S. 1881).

It may be objected to this view that it requires as

Close, by Next Friend, v. Pittsburgh, etc., R. W. Co.

much trouble to incorporate extrinsic matter into the record by an order of court as by a bill of exceptions. To which it may be answered that there is nothing apparent on the face of the section quoted indicating a legislative intent to make it any less cumbersome than a bill of exceptions, except in one particular. The only difference so far as work is concerned is, that the order is written out on the order book by the clerk under the direction of the court, saving the counsel the trouble of writing a bill of exceptions and securing the judge's approval and signature thereto.

It has been uniformly held by this court that in case of a skeleton bill of exceptions, even with a direction to (here insert), the clerk cannot make the matter directed to be inserted in such place a part of the record by a reference to such matter elsewhere copied into the transcript, if such matter so elsewhere copied was not there a legitimate part of the record. *Douglas v. State*, 72 Ind. 385; *Kesler v. Myers*, 41 Ind. 543; *Carver v. Carver*, 44 Ind. 265; *Kimball v. Loomis*, 62 Ind. 201; *Colee v. State*, 75 Ind. 511; *City of New Albany v. Iron Substructure Co.*, 141 Ind. 500, 504. If a bill of exceptions cannot make such extrinsic matters a part of the record by a mere reference to them between the brackets in the bill where they ought to have been inserted, the reason is much stronger why the order of the court could not do so.

It would be most unreasonable to suppose that the legislature intended in providing two methods of incorporating extrinsic matter into the record, that one should be any less certain than the other as to what is a legitimate part of the record after it is done. It is inconceivable that the legislature intended to leave attorneys free to choose between a loose, slipshod, and an orderly, certain, and effectual way of making such matters a part of the record.

Paul v. The Town of Walkerton.

We therefore conclude that the interrogatories, answers thereto, and the motion to reject the complaint have not been made a part of the record by the order of the court. And hence, we cannot tell whether the court erred in rejecting the complaint or not. But the presumption of law is that the circuit court in all things conformed to and complied with the law, until the contrary is made to appear affirmatively by the record. Elliott's App. Proc., sections 709-712, and cases there cited. And the contrary is not made to appear by this record.

Therefore the judgment is affirmed.

PAUL v. THE TOWN OF WALKERTON.

[No. 18,358. Filed May 24, 1898.]

MUNICIPAL CORPORATIONS.—*Annexation of Territory.—Petition.*

Sufficiency.—A petition for the annexation of territory to a town, which shows that many persons in the territory sought to be annexed have been receiving the benefits and advantages of the town, without bearing their share of its burdens, and that public interests require that said territory be annexed, and that it is just and equitable, and for the public good, that said petition be granted is sufficient. pp. 566, 567.

SAME.—*Annexation of Territory.—Appeal.—Trial De Novo.—Doctrine of Practical Construction.—Stare Decisis.*—The provision of section 4226, Burns' R. S. 1894, that an appeal from the board of county commissioners in a proceeding for the annexation of contiguous territory to a city or town shall be tried *de novo*, is constitutional, under the doctrine of practical construction and the rule of *stare decisis*. 568-575.

From the St. Joseph Circuit Court. *Reversed.*

Jacob D. Henderson, Stuart McKibbin and Francis M. Jackson, for appellant

Walter Funk and A. L. Brick, for appellee.

MONKS, J.—This proceeding was brought before the board of commissioners of St. Joseph county, under sections 4426-4427, Burns' R. S. 1894 (3389-3390, Hor-

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152	78
153	79
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Paul v. The Town of Walkerton.

ner's R. S. 1897), to annex certain unplatted territory to the town of Walkerton. Appellant appeared before the board and filed a remonstrance. A trial of said cause resulted in a finding and judgment by the board that said territory be annexed. Appellant appealed to the circuit court, where the cause was heard by a jury, and a verdict returned against appellant by direction of the court, and over a motion for a new trial, judgment was rendered that said territory be annexed.

The errors assigned and not waived call in question the sufficiency of the petition to annex said territory, and the action of the court in overruling appellant's motion for a new trial.

The petition sets forth the following as the reasons for asking for such annexation: "First. That the inhabitants of said territory and the persons who own the same enjoy all or many of the privileges of living within the said town, without paying any taxes therefor, although their lands are largely increased in value by reason of their proximity to the said town; that much of said territory is thickly settled and built up with homes and valuable improvements and railroad tracks, and that they have derived great income and benefit from the said town and have become very valuable by reason of adjoining the said town; that said territory requires police surveillance which can be better secured by a municipal control; that a highway passes through portions of such territory on which there is much travel, and requiring by reason thereof to be kept in better order than at present kept in; that there are present, streets in the said town that have no outlet, but end at the corporate limits, as now existing, and cannot be extended through any of said territory where needed, and none can be procured, however much they may be needed by the pub-

Paul v. The Town of Walkerton.

lic, and however much they may be of public utility and benefit. Second. That the present limits of the town of Walkerton are in an irregular shape, and that the annexation of the proposed lands will make the limits of the said town more regular. That one reason for annexing this territory is to make the plat of the said town uniform, regular for description upon the tax duplicates of the said county. Third. That in view of all the facts set forth and that the inhabitants of the said tract of land enjoy the benefit of living within the said corporation, and having been gaining revenues therefrom, and have and enjoy valuable property and improvements thereon, and are at the same time exempt from the burden and costs of maintaining the town government while enjoying its privileges and advantages, and the increase of the value of the real estate by reason of its proximity to the said town, and also that some of the inhabitants and occupants of the said territory proposed to be annexed, are now reaping advantages from the said town, without bearing any of its burdens in the way of furnishing the said town with railroad conveyance and railroad facilities, and the fact of the town having been their patrons for fifteen years or more, and for other reasons and things, and that they have full and free use of the school and the police and fire departments of the said town, without bearing any of the burdens of it, and also of the streets of the said town."

The petition shows that many persons in said territory have been receiving the benefits and advantages of the town without bearing their share of its burdens and that public interests require that said territory be annexed, and that it is just and equitable and for the public good that said petition be granted. Said petition is clearly sufficient under the decisions of this court. *Elston v. Board of Trustees of Craw-*

Paul v. The Town of Walkerton.

fordsville, 20 Ind. 272; *Catterlin v. City of Frankfort*, 87 Ind. 45, 52-53; *Chandler v. City of Kokomo*, 137 Ind. 295.

The motion for a new trial assigned a number of reasons why the same should be granted, a part of which relate to the exclusion of evidence offered by appellant, and a part to the giving and refusal to give instructions. Among the causes assigned for a new trial were the following: That the court erred in directing the jury to return a verdict in favor of the appellee, and that the verdict of the jury was contrary to law, and contrary to the evidence. The only evidence given by appellee at the trial of said cause was as to the regularity of the proceedings before the board of commissioners. No evidence was given to support or prove any of the reasons set forth in the petition for annexation, or any allegation contained in said petition, except that said territory was contiguous to said town, and that the same was unplatted. The court also excluded all evidence in support of the remonstrance. It is stated in the briefs that the trial court directed the verdict of the jury, and excluded the evidence offered by appellant, upon the theory that under the law as it is administered in this State, the annexation of territory to a town or city is a legislative and not a judicial function; and that the act of the board of commissioners in granting the prayer of a petition for annexation or refusing the same, is one of legislative discretion; and that for that reason it was not proper to give any evidence on the trial in the circuit court, either to sustain or contradict the grounds set forth in the petition for annexation.

The legislature in this State has provided by general laws for the incorporation of towns and cities, and for the annexation of contiguous territory to the same when incorporated. The power to hear and de-

Paul v. The Town of Walkerton.

termine applications for the incorporation of towns and cities, and for the annexation of contiguous unplatted territory has been vested in the boards of commissioners, and, on appeal from said boards, in the courts.

Counsel for appellee insist that the enlargement of municipal bodies is a political question to be determined by the legislature, and not judicial to be determined by the courts, and that while the legislature may, by general laws, confer such power upon boards of commissioners, as has been done in this State, it cannot confer upon courts the power to adjudge or decree the annexation of contiguous territory to a municipality, for the reason that under our constitution legislative power cannot be delegated to the courts.

It is true that the power to create, enlarge, and regulate municipal corporations is a legislative power. But general laws authorizing the common councils of cities, and the boards of trustees of towns by resolution, without notice to anyone, to annex contiguous territory which has been platted into lots and the plat recorded, have been upheld. *Mayor, etc., v. Weems*, 5 Ind. 547, 549; *Elston v. Board of Trustees of Crawfordsville*, *supra*, 275; *City of Evansville v. Page*, 23 Ind. 525; *Edmunds v. Gookins*, 24 Ind. 169; *Taylor v. City of Fort Wayne*, 47 Ind. 274, 283; *Stilz v. City of Indianapolis*, 55 Ind. 515; *City of Indianapolis v. Patterson*, 112 Ind. 344, 347, and cases cited; *Collins v. City of New Albany*, 59 Ind. 396; *Mullikin v. City of Bloomington*, 72 Ind. 161; *Strosser v. City of Ft. Wayne*, 100 Ind. 443, 446; *Glover v. City of Terre Haute*, 129 Ind. 593. See, also, *Tilford v. City of Olathe*, 44 Kans. 721, 25 Pac. 223; *City of Emporia v. Smith*, 42 Kans. 433, 22 Pac. 616; *Kelly v. Meeks*, 87 Mo. 396; *Copeland v. City of St. Joseph*, 126 Mo. 417, 29 S. W. 281; *Blanchard v. Bissell*, 11 Ohio St.

Paul v. The Town of Walkerton.

96; 1 Dillon on Municipal Corp. (4th ed.), sections 183, 185; 1 Beach on Pub. Corp., sections 399, 406, 408.

General laws, providing the conditions upon which contiguous territory can be annexed, and the mode of procedure, and vesting the power in boards of commissioners and courts to hear and determine the same and order or refuse such annexation, have also been, as we think, correctly upheld. *City of Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 818; *City of Seward v. Conroy*, 33 Neb. 430, 50 N. W. 329; *City of Wahoo v. Tharp*, 45 Neb. 563, 63 N. W. 840; *Callen v. Junction City*, 43 Kans. 627, 23 Pac. 651; *Callen v. Junction City*, 41 Kans. 466, 21 Pac. 647; *Steele v. City of Newton*, 41 Kans. 512, 21 Pac. 644; *Hurla v. Kansas City*, 46 Kans. 738, 27 Pac. 143; *City of Burlington v. Leebrick*, 43 Iowa 252; *Kayser v. Trustees of Bremen*, 16 Mo. 881; *State, ex rel., v. Weatherby*, 45 Mo. 17; *State, ex rel., v. Wilcox*, 45 Mo. 458; *Lammert v. Lidwell*, 62 Mo. 188, 21 Am. Rep. 411; *Blanchard v. Bisell*, *supra*; *Gunter v. Fayetteville*, 56 Ark. 202, 19 S. W. 577; *Vogel v. Little Rock*, 55 Ark. 609, 19 S. W. 13; *Vestal v. Little Rock*, 54 Ark. 321, 15 S. W. 891; *Foreman v. Town of Marianna*, 43 Ark. 324; *Dodson v. Mayor, etc.*, 33 Ark. 508; *Forsythe v. City of Hammond*, 68 Fed. 774; 1 Dillon on Municipal Corp., *supra*; 1 Beach on Pub. Corp., *supra*.

The decisions of the courts upon this question are not in harmony, and among the cases cited as holding the contrary doctrine, are *City of Galesburg v. Hawkinson*, 75 Ill. 152; *State v. Simons*, 32 Minn. 540, 21 N. W. 750.

After the adoption of our present constitution, in 1851, and the enactment of statutes concerning annexation to cities and towns of unplatted territory contiguous thereto by proceedings before the boards of

Paul v. The Town of Walkerton.

commissioners, appeals were taken from boards of commissioners in such cases to the courts and there tried *de novo* until 1871, when in the case of the *Town of Princeton v. Manck*, 35 Ind. 51, this court held that there was no appeal from the decision of the board of commissioners in annexation cases, for the reason that the statutes concerning annexation expressly provided that the order of the board, or an attested copy thereof, "shall be conclusive evidence in all courts of such annexation," and that therefore the general provisions for appeals from the board of commissioners did not apply to such proceedings. *Church v. Town of Knightstown*, 35 Ind. 177; *City of Indianapolis v. Sturm*, 39 Ind. 159; *Windman v. City of Vincennes*, 58 Ind. 480, 486; *Baltimore, etc., R. R. Co. v. Board, etc.*, 73 Ind. 213, 217, 218.

In 1879, however, the legislature passed an act, sections 4224-4227, Burns' R. S. 1894 (3243-3246, Horner's R. S. 1897), providing for an appeal by either party to such proceedings, since which time appeals have been taken under said act from decisions of boards of commissioners refusing to annex contiguous territory to towns and cities, as well as from decisions annexing such territory. For more than forty years this court has, under the laws authorizing the annexation of contiguous unplatted territory to towns and cities, uniformly recognized the power of the courts on appeal to hear and determine annexation cases *de novo*, and to render final judgment annexing or refusing to annex such territory without regard to the result before the board of commissioners. *Mayor, etc., v. Weems, supra*; *Woodfill v. Town of Greensburgh*, 18 Ind. 203; *Elston v. Board of Trustees of Crawfordsville, supra*; *Longworth's Executors v. Common Council of Evansville*, 32 Ind. 322; *Catterlin v. City of Frankfort, supra*; *Chandler v. City of Kokomo, supra*;

Paul v. The Town of Walkerton.

Windfall Mfg. Co. v. Emery, 142 Ind. 456; *Forsythe v. City of Hammond*, 142 Ind. 505; *Wilcox v. City of Tipton*, 143 Ind. 241.

In *Forsythe v. City of Hammond*, *supra*, this court held that the board of commissioners in considering and deciding upon the petition, acts in a judicial capacity, and that the legislature had provided for an appeal from such decision of the board to the courts. In said case, the petition to annex contiguous unplatted territory had been refused by the board of commissioners, and the city appealed to the circuit court, where the same was heard *de novo* by the court and jury, and a verdict returned in favor of the petition for annexation, and judgment was rendered by the circuit court annexing said territory, and said judgment was affirmed on appeal to this court. It is there said, on pp. 516-517: "It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board. It must be admitted, however, as we think, that the after proceedings had upon the petition are of a judicial nature. The petition must give the reasons why, in the opinion of the council, the annexation, should take place. The sufficiency of such reasons, and whether they in fact exist, calls for the decision of the tribunal appointed to hear the petition. Notice of the presentation of the petition is also provided for, and adverse parties are thus brought in. Whether the proper preliminary steps have been taken, whether the reasons given in the petition are true, and are sufficient, seem to be questions calling for a judicial examination and decision. * * * It is the law itself, as has been said, that fixes the conditions of annexation; and the office of the board and the court

Paul v. The Town of Walkerton.

is to determine whether the conditions so prescribed by the law have been complied with. The legislature has expressly provided for such judicial determination by the board, and for an appeal therefrom to the courts; and this court has frequently recognized the right to such appeal. Section 4224, Burns' R. S. 1894 (3243, R. S. 1881)." The case of *Forsythe v. City of Hammond*, *supra*, was cited with approval in *Board, etc., v. City of Terre Haute*, 147 Ind. 134, which was an annexation case.

The statute under which this cause was appealed to the court below, provides that "the appeal shall be tried and determined as an original cause." Section 4226, Burns' R. S. 1894 (3245, Horner's R. S. 1897).

In *Wilcox v. City of Tipton*, *supra*, this court held that when an action brought by a city to annex unplatted territory, and the same is appealed to the circuit court, that the petition for annexation may be amended in said court by excluding certain territory included in the original petition, and that said cause must be heard *de novo* in said court. This court, at p. 246, said: "We now have a statute granting the right of appeal and providing that 'the appeal shall be tried and determined as an original cause,' section 4224, *et seq.*, Burns' R. S. 1894 (3243, *et seq.*, R. S. 1881). It has been settled by this court that such proceedings, on appeal to the circuit court, are tried *de novo*. *Chandler v. City of Kokomo*, 137 Ind. 295, and cases there cited."

In *Chandler v. City of Kokomo*, *supra*, which was a proceeding to annex unplatted territory to a city, brought by the city of Kokomo before the board of commissioners of Howard county, and appealed to the circuit court, and from the judgment of the circuit court appealed to this court, the court said: "The general denial and a special remonstrance were filed

Paul v. The Town of Walkerton.

before the board, and required proof of every issuable fact. Upon appeal to the circuit court, every question in issue before the board was triable *de novo*, the decision thereof by the board having been suspended by the appeal."

Under the laws of this State it is not the order and judgment of the circuit court or the board of commissioners alone that annexes the unplatted territory to a town or city, but it requires the concurrence of the common council of the city or the board of trustees of the town. *Wilcox v. City of Tipton*, *supra*, pp. 245-247; *City of Peru v. Bearss*, 55 Ind. 576; *Windman v. City of Vincennes*, 58 Ind. 480.

It may be true that the laws of this State concerning the annexation of unplatted contiguous territory to towns and cities are not as full, certain, and definite as to the conditions upon which such territory can be annexed as are the laws of Kansas and other states where such laws have been upheld, but the courts of this State have tried and determined annexation cases under said laws for over forty years, during which time the laws named have been recognized and acted upon as valid by all the departments of the government. To overthrow the part of said laws under which the courts exercised such jurisdiction might lead to great complications and embarrassments in public affairs. In many cases the courts on appeal may have rendered judgments annexing territory which the board of commissioners had refused to annex. Many towns and cities to which territory has been annexed by the judgments of the courts, have built streets and sewers, and extended water mains through such annexed territory, erected schoolhouses thereon, and incurred debts on account thereof, and have incurred indebtedness in excess of two per cent. of the value of their taxable property, if such an-

Paul v. The Town of Walkerton.

nexed territory is excluded from such valuation. To hold that appellant's contention is correct, would declare void all judgments rendered by courts annexing territory, at least where annexation had been refused by the board of commissioners, and that the same was not annexed to such municipality, and that the indebtedness of said municipality was created in violation of the provisions of the constitution limiting the power of municipalities to become indebted. Such a holding might render void the bonds and other obligations of municipalities which would otherwise be valid, and bring great embarrassment to many municipalities and the territory supposed to have been annexed, besides many other unjust and injurious results which cannot be foreseen. Under the doctrine of practical construction, as well as under the rule of *stare decisis*, without regard to what the court might think of the correctness of appellee's contention, in the abstract, it would seem that the question thereby presented should be regarded as settled, and that the courts of this State have jurisdiction to try annexation cases *de novo* on appeal, as held in *Forsythe v. City of Hammond*, and cases cited, *supra*.

It follows that appellee, not having given any evidence in support of the reasons stated in the petition for annexation, the court erred in directing the jury to return a verdict in its favor.

We decide nothing in regard to the evidence offered, for the reason that the same has not been argued, except in a general way, and the question as to the admissibility of said evidence may not arise at another trial.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

Howard, J., took no part in the decision of this cause.

Pittsburgh, etc., R. W. Co. v. Frazee.

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159	134

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162	470

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163	614

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164	226

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. FRAZE.

[No. 18,378. Filed May 24, 1896.]

PLEADING.—*Sham Pleading.*—Section 885, Burns' R. S. 1894, providing that a pleading may be rejected as sham where it plainly appears on its face, or by answer to interrogatories, to be false or intended for delay, does not authorize the court to reject a pleading upon answers to interrogatories tending to show that the facts averred in the pleading were false, where the court could only reach the conclusion that the allegations were false by weighing and balancing the probabilities arising from certain inferences to be drawn from physical facts stated in such answers. *pp. 576-578.*

RAILROADS.—*Accident at Crossing.*—*Burden of Proof.*—Where a person is injured by a collision with a train, while crossing a railroad track, the fault is *prima facie* his own, and before a recovery can be had for such injury, it must be shown not only that he looked and listened without seeing or hearing the train in time to escape, but that he could not have seen it or heard it in time to have escaped if he had looked and listened. *pp. 578-582.*

From the Jackson Circuit Court. *Reversed.*

S. Stansifer and Applewhite & Applewhite, for appellant.

A. N. Munden, for appellee.

MCCABE, J.—The appellee sued the appellant to recover damages resulting from a personal injury to appellee, at a place where appellant's railway is crossed by a highway, caused, as is alleged, by the negligence of appellant. The issues were tried by a jury, resulting in a verdict for the plaintiff, upon which judgment was rendered, over appellant's motion for a new trial. The trial court overruled a demurrer to the complaint, and overruled appellant's motion to reject the complaint. Upon these several rulings alone error is assigned by appellant. The court, we think, properly overruled the motion to reject the complaint. The statute requires the court not only to reject, as sham,

Pittsburgh, etc., R. W. Co. v. Frazz.

an answer, but any other pleading "either when it plainly appears upon the face thereof to be false in fact, and intended merely for delay, or when shown to be so by answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false." Section 385, Burns' R. S. 1894 (382, R. S. 1881). The appellant propounded interrogatories to appellee for that purpose, and they were answered by him. The object of such interrogatories, and the answers of appellee thereto, was to show that the allegation in the complaint that he was free from contributory negligence was false. The particular contributory negligence sought to be shown by the answers to the interrogatories was whether appellee looked both ways and listened attentively for a coming train of cars, and whether he saw the train in time to avoid, as he approached the crossing, injury thereby. Appellee's answers to the interrogatories specifically and directly state that he did so look and listen, and did not see the train in time to avoid the injury he suffered thereby. But appellant contends that the answers disclose a number of physical facts and surrounding circumstances sufficient to show that the answers to such interrogatories were false, either in stating that appellee did so look and listen, or, if he did so look and listen, that he did not see the train. Such a state of facts does not comply with the statute requiring the rejection of the pleading as sham for its falsity. It must plainly appear, either upon its face, or by answers to the interrogatories to be false. Here it does not plainly appear on the face of the complaint, nor does it so appear from answers that the particular allegation mentioned is false. The trial court could only reach the conclusion that it was false by weighing and balancing the probabilities aris-

Pittsburgh, etc., R. W. Co. v. Frazz.

ing from certain inferences to be drawn from physical facts, the lay of the land, the railroad track and the highway; the presence or absence of obstructions to the sight of the coming train, stated in said answers to said interrogatories, tending to show that appellee might have seen the same as he approached the crossing. In other words, the court below was required to weigh and determine whether the physical facts and surrounding circumstances set forth in said answers were sufficient, as appellant contends they were, to overcome and destroy the appellee's positive statement that he did look both ways and listened attentively as he approached the crossing, and failed to see or hear the train in time to avoid being struck thereby. In such a case the question of fact thus presented cannot be tried and determined on a motion to reject the pleading. Bliss on Code Pleading (3d ed.), section 422, and authorities there cited. There was no error in overruling the motion to reject.

Only two points are urged under the motion for a new trial, namely: That the circuit court erroneously refused certain instructions, and that the evidence is not sufficient to establish appellee's freedom from contributory fault.

The substance of the seventeenth instruction asked by appellant and refused by the court, is as follows: "If the evidence fails to satisfy your minds by a preponderance, that the plaintiff by diligently listening for trains, and diligently looking behind him or in the direction of the train, could not have seen or heard said train at any time or place as he approached the crossing, and before too near to it, then * * * I instruct you that the law demands that your verdict be for the defendant." In view of the evidence in the case this instruction was peculiarly applicable, and ought to have been given, if it correctly expresses the law.

Pittsburgh, etc., R. W. Co. v. Frazee.

It has been repeatedly affirmed by this court that "When a person crossing a railroad track is injured by a collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively, that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury." *Hathaway v. Toledo, etc., R. W. Co.*, 46 Ind. 25; *Cincinnati, etc., R. W. Co. v. Butler*, 103 Ind. 31; *Mann v. Belt R. R., etc., Co.*, 128 Ind. 138; *Smith v. Wabash R. R. Co.*, 141 Ind. 92; *Cincinnati, etc., R. W. Co. v. Duncan, Admr.*, 143 Ind. 524; *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449.

It is also thoroughly established law in this State that "In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. * * * If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by a collision, either that he did not look, or, if he did look, that he did not heed what he saw." *Mann v. Belt R. R., etc., Co.*, *supra*; *Lake Erie, etc., R. R. Co. v. Stick*, *supra*.

It is also established that the law will assume that such person "actually saw what he could have seen, if he had looked, and heard what he could have heard, if he had listened." *Cones, Admr., v. Cincinnati, etc., R. W. Co.*, 114 Ind. 328; *Lake Erie, etc., R. R. Co. v. Stick*, *supra*.

The law then will presume that this appellee saw the train in time to escape, if he could have seen it by looking, and heard it also in time to escape, if he could have heard it had he attentively listened. Then how necessary it was to instruct the jury, as requested in the seventeenth instruction, that in case appellee had failed to prove that he could not see or hear the

Pittsburgh, etc., R. W. Co. v. Frazz.

train in time to escape, he must fail. The burden being on him to prove his freedom from fault or contributory negligence, it is not enough to prove that he looked and listened without seeing or hearing the train in time to escape. Why? Because the law, as we have seen, will presume he both saw and heard it if the other facts in evidence are such as to clearly show that he could have seen it, or heard it, or both, in time to escape, if he had looked or listened. And the evidence was such as to justify and legally require the giving of such an instruction. It left the question of fact to the jury to determine, that is, whether the evidence had failed to prove that the plaintiff, by attentively looking and listening, could not have seen or heard the train in time to escape. In case the evidence did so fail, the instruction is that the verdict must be for the defendant; because in that event the plaintiff has not established his freedom from contributory negligence, even though he has sworn that he looked and listened without seeing or hearing the train in time to escape. This is so, because physical facts established beyond dispute may be of such a nature as to overcome conclusively mere verbal statements sworn to. If the physical facts in evidence were such as to show clearly that appellee could have seen the train in time to escape if he had looked, or heard it in time to have escaped had he listened, it is clear that he could not recover, even though he testified that he both looked and listened for it, and did not see or hear it in time to escape. It is true that puts upon him the burden of proving, not only that he looked and listened for the train and did not see or hear it in time to escape, but also that he could *not* have seen or heard it, by looking and listening for it, in time to escape. This is the law, because, if he is not required to prove, as the seventeenth instruction

Pittsburgh, etc., R. W. Co. v. Frazee.

directs, that he could not have either seen or heard the train in time to escape by looking or listening, then he may recover in the face of physical facts in evidence showing that it was a moral impossibility for him to fail to see the train, or fail to hear it in time to escape, had he looked or listened for it attentively. To hold otherwise would violate the rule already mentioned, long established here and elsewhere, that a traveler approaching a railroad crossing of a highway is presumed in law to have seen what he could have seen, if he had looked attentively, and to have heard what he could have heard, if he had listened attentively. The reason of this presumption is that it was the traveler's solemn duty to look attentively when approaching such a crossing, and listen attentively for a coming train. This duty only relates to coming trains or vehicles on the railroad track, and hence the presumption that he saw and heard what he might have seen and heard relates only to coming trains or vehicles on the railroad track.

Appellee's counsel insist that there was no available error in refusing the seventeenth instruction, even though it correctly stated the law, because the twelfth instruction given by the court, at appellant's request, as is claimed, covers the same ground covered by the refused instruction. But we have examined that instruction, and find that it does not embrace the peculiar element embraced in the seventeenth, which we have been discussing, nor was there any instruction given by the court that did embrace that matter. We therefore hold that the court erred in refusing to give the instruction, for which the judgment must be reversed.

We are also asked to reverse the judgment because of the insufficiency of the evidence to establish appellant's freedom from contributory negligence.

Magel et al. v. Milligan et al.

We refrain from commenting on the evidence, lest it might have the effect to prejudice the plaintiff's case before another jury, as a new trial must be had. We content ourselves by calling attention of the trial court to the admonition contained in *Lake Erie, etc., R. R. Co. v. Stick, supra*, which was designed as much for the instruction of trial judges generally in the State as it was the learned judge presiding in the trial of that particular case. Injustice is often done unintentionally by the trial judge shrinking from the responsibility cast upon him by the law of granting a new trial where the evidence fails to support the verdict. The injustice resulting from a failure to courageously meet and discharge that responsibility in many instances cannot be rectified by this court.

For the error in refusing the seventeenth instruction asked by the appellant, the trial court should have granted appellant's motion for a new trial. For that error the judgment is reversed, and the cause remanded, with instructions to sustain the defendant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

MAGEL ET AL. v. MILLIGAN ET AL.

[No. 18,480. Filed May 24, 1898.]

150	582
155	626
156	51
150	582
158	291

APPEAL.—*Joint Assignment of Errors.—Husband and Wife.*—Where a husband and wife join in an assignment of errors, the assignment will be good as to both if it is good as to the wife. p. 585.

DECEDENT'S ESTATE.—*Action by Heirs.—Complaint.*—Where an action is brought by heirs for a debt due an ancestor, it is necessary to allege and prove that the debts of the ancestor have been paid, and the estate settled, or that no letters of administration have been granted. p. 585.

EVIDENCE.—*Possession of Note.*—The possession of a note and mortgage securing it is *prima facie* evidence of title in them. p. 586.

HUSBAND AND WIFE.—*Estate by Entireties.—Mortgage.—Estoppel.*—Where a husband and wife own real estate by entireties, and, desiring to procure a loan, make an affidavit setting forth that a part of

Magel *et al.* v. Milligan *et al.*

the money to be borrowed is to be used to pay off an incumbrance upon the land, and the balance to purchase other land to be held by entireties, and upon the faith of such affidavit the loan is made, and a mortgage on such real estate accepted as security, the wife will afterwards be estopped from claiming that the mortgage was executed to secure money to pay the husband's debts, and therefore void. *pp.* 586, 587.

HUSBAND AND WIFE.—*Estate by Entireties.*—*Presumption.*—Where property is held by entireties, there may be some presumption indulged that the owners are, as they seem to be, equally interested and equally responsible, and that, when they give their joint note and mortgage, they are joint principals. *p.* 588.

From the Marion Superior Court. *Affirmed.*

F. E. Gavin, C. F. Coffin and T. P. Davis, for appellants.

William T. Brown, for appellees.

HOWARD, J.—This was an action on promissory notes, and to foreclose mortgages securing the same. The notes and mortgages were executed by appellants, husband and wife, in favor of Joseph Milligan, deceased; and the action was brought by appellees as the only heirs at law of the said Joseph Milligan.

The appellant Louisa Magel filed her separate answer to the complaint, in which she averred, that at the time of the execution of the notes and mortgages she was, and ever since has continued to be, the wife of Henry Magel, her co-appellant; that the money received for said notes and mortgages was received by her said husband; that none of it was ever received by her, or used in the improvement of her separate estate; and that she signed the notes and mortgages simply and solely to enable her husband to procure a loan for his own use and benefit.

To this answer the appellees replied, admitting that appellants were at the date of the notes and mortgages, and still are, husband and wife, and that the land mortgaged was then and still is held by them as tenants by entireties. But, it is further said in the re-

Magel et al. v. Milligan et al.

ply, the notes and mortgages were executed by appellants for a loan then made to them by Joseph Milligan. And the reply continues, that before said loan was made or said notes and mortgages executed, the appellants, "for the purpose of showing and convincing said Joseph Milligan, and those acting for him in the matter, for what purpose said debt was made and said notes and mortgages given, and the use that was to be made of the money to be obtained upon said loan," signed and made oath to a written statement, set out in the reply. In this affidavit it was stated that the appellants were the owners in fee simple by entireties of the lands on which the mortgages were to be given; that the money to be borrowed was to be used in part to pay off an encumbrance then upon the land, and the balance to purchase other land, also to be held by entireties; that Louisa Magel presented said affidavit to Joseph Milligan and to those acting for him in the matter, "intending that they should rely upon said statement, and should act thereon in making said loan. And said Joseph Milligan and those acting for him did believe the said statement to be true, and did, in good faith, rely upon the same, and did make said loan so believing said statement and so relying upon the truth of the same. If said Joseph Milligan or those acting for him had known that said statements were false, and that said loan was, as alleged in the said answer, made for the sole use of the defendant, Henry Magel, said loan would not have been made, nor would said loan have been made if said representations had not been made. And plaintiffs say that the proceeds of said loan were applied first to the payment of the mortgage debt set out and mentioned in said affidavit, which was a valid and subsisting lien upon the real estate described in the complaint, and the residue was paid and given

Magel et al. v. Milligan et al.

to both of the defendants by a check upon a bank, payable to the order of both defendants."

Upon the issues so formed the court found for the appellees, that the mortgages securing the notes given for the loans were valid liens upon the lands of appellants, and should be foreclosed. Over a motion for a new trial, made by Louisa Magel, judgment was rendered in favor of appellees.

Both appellants unite in assigning as error that the court overruled Louisa Magel's motion for a new trial. There is some discussion as to whether the assignment so made is joint or several as to the parties appellant. But in this case the question is not material. Henry Magel did not make any motion for a new trial, and took no exceptions to any ruling of the court in regard to such motion. Ordinarily, therefore, an assignment of error made by him that the court overruled a motion for a new trial would not be available; and, under the general rule that a joint assignment of error must be good as to all who unite in it, the assignment here, being bad as to Henry Magel, would be bad also as to his co-appellant, Louisa Magel. But there is an anomalous exception to the general rule here stated, a remnant of old procedure resulting from the former legal relations of husband and wife; and, according to this exception, it is held that where husband and wife are parties an assignment will be good as to both if it is good as to the wife. Elliott's App. Proc., section 319; *Stewart v. Babbs*, 120 Ind. 568; *Sibert v. Copeland*, 146 Ind. 387. The fact that Henry Magel joined in the assignment made by his wife did not, therefore, make the assignment bad.

Where, as in this case, an action is brought by heirs to recover a debt due an ancestor, it is necessary to allege and prove that the debts of the ancestor have been paid, and the estate settled, or that no letters of

Magel et al. v. Milligan et al.

administration have been granted. *Finnegan v. Finnegan*, 125 Ind. 262. The reason for this rule is a very sound one. So long as there is an administrator he is entitled to recover all debts due the estate; besides, the heirs can have no right to sue for and recover debts due the estate when such amounts may be needed to make payment to the creditors of the estate. The claims of creditors are paramount to the rights of heirs.

It is admitted by appellants that the allegations of the complaint in this respect were sufficient; but they contend that there was not sufficient evidence to show that Joseph Milligan's estate had been settled. It was admitted on the trial that Joseph Milligan died intestate, that prior to the commencement of the action "all the debts of his estate had been paid and settled up," and that the appellees are his only surviving heirs. This admission alone would not perhaps have been sufficient to show that the estate had been settled, and that there was no administrator. We think, however, that there was enough other evidence heard by the court to authorize the finding that the estate had been settled. The appellees were in possession of the notes and mortgages, and this was at least *prima facie* evidence of title in them. 2 Parson Notes and Bills, 444; *Casto v. Evinger*, 17 Ind. App. 298. Sufficient inferences, as we think, could be drawn from the evidence in the record to support the allegation made in the complaint that the estate had been settled. There was nothing shown to the contrary.

The chief contention made by appellants is that the evidence does not support the finding of the court. A careful reading of the record has, however, satisfied us that, notwithstanding the conflict in the evidence, the court had ample support for the finding made. The affidavit filed by appellants when the loan was made

Magel et al. v. Milligan et al.

was explicit as to the use to be made of the money, and would seem to have fully justified Joseph Milligan in relying upon the representations then made to him that the money was to be used, not for the husband, but for the benefit of the wife's estate. This affidavit was presented by the wife herself, and the evidence showed that she understood the contents of the affidavit at the time she swore to its truth. A part of the money was certainly used to pay a lien upon the land, for which the wife was jointly liable with her husband; and the remainder was paid, not to the husband, but to the husband and wife, by check to their joint order; and it was shown that she and her husband both indorsed these checks before the money was drawn from the bank. If money cannot be safely loaned to a husband and wife after the taking of such precautions, it would seem that it could not be loaned at all. The parties should be estopped from now denying the consequences of their own words and acts. *Rogers v. Union Cent. Life Ins. Co.*, 111 Ind. 343, 60 Am. Rep. 701; *Wertz v. Jones*, 134 Ind. 475; *Trimble v. State*, 145 Ind. 154, 57 Am. St. 163.

Even if it were true that the husband and wife had a secret understanding with one another that the money to be borrowed was not to be used as agreed to in the affidavit filed by them, and even if the money were actually used by the husband in violation of such sworn affidavits; yet, unless the wife were shown to be totally ignorant of the nature of the proceedings, no benefit ought to accrue to her from such deception; nor ought such fraud on the part of husband and wife avail to make it unlawful for one to loan them his money, relying, as the decedent here did, upon their false representations. Husband and wife should not be suffered to take advantage of their own wrong in so concealing their real design, unless, indeed, the

Bank of Commerce, etc., v. First Nat'l Bank, etc., et al.

money lender himself had knowledge of the true state of the facts, and so participated in the violation of the law, which we do not think is here shown. *Cummings v. Martin*, 128 Ind. 20.

It may be added that a difference has been recognized between a case such as this, where husband and wife own their lands by entireties, and a case where one or both are the owners of separate interests. *Security Co. v. Arbuckle*, 119 Ind. 69. If the property is held by entireties, there may be some presumption indulged that the owners are, as they seem to be, equally interested and equally responsible, and that when they give their joint note and mortgage they are joint principals; and, in the face of such presumption, there should be some satisfactory proof to show that the wife is only surety, if such should be the fact. *Miller v. Shields*, 124 Ind. 166. Here the only such evidence offered amounts to little more than a claim that husband and wife joined in a scheme to deceive the money lender. It has often been held that the beneficent statute framed to protect the wife and family and home ought not to be perverted into a cloak for fraud. *McCoy v. Barns*, 136 Ind. 378. Judgment affirmed.

THE BANK OF COMMERCE OF EVANSVILLE, INDIANA, v.
THE FIRST NATIONAL BANK OF EVANSVILLE,
INDIANA, ET AL.

[No. 18,455. Filed May 24, 1898.]

MORTGAGES. — *Judgment Liens. — Priority. — Marshaling Assets. —*

Where a creditor takes a mortgage on land, it then being apparent that certain prior judgment liens can be fully paid from other land covered by such liens, the right to require such payment will continue and be protected as against such judgment liens.

From the Vanderburgh Superior Court. *Affirmed.*

Bank of Commerce, etc., v. First Nat'l Bank, etc., et al.

Alexander Gilchrist and Curran A. De Bruler, for appellant.

T. E. Garvin, G. A. Cunningham and T. E. Garvin, Jr., for appellees.

HACKNEY, C. J.—David J. Mackey owned several parcels of real estate, estimated to be of the value of \$200,000.00, upon which were certain judgment liens of about \$13,000 in favor of parties not here interested. Mackey gave to the First National Bank, appellee, a mortgage on parts of said real estate, referred to, for convenience, as No. 1, for about \$100,000. Thereafter he executed to one Cook, as trustee, a conveyance of the remaining parts of said real estate, which we will refer to as No. 2, the purpose of the trust being the sale of parcels included in No. 2, and the application of the proceeds to certain claims for a large sum owing to the Bank of Commerce, appellant. Still later the Bank of Commerce purchased the judgments mentioned. The trustee sold a large part of No. 2 and applied the proceeds to the claims of the appellant, other than said judgments. In a foreclosure proceeding instituted by the appellee, First National Bank, the question was made as to the rights of said appellee to require said judgments, so held by said appellant, to be made first from the property No. 2. The lower court held that they should be so enforced, and this appeal is from that holding.

The learned counsel for the appellant makes this concession: "Of course the general doctrine that where a creditor has access to two funds for the payment of his debts, and another creditor is confined to one of those funds, the dominant creditor will be compelled in the first instance to exhaust the fund upon which the other creditor has no security before resorting to the latter, is conceded." It is practically con-

Bank of Commerce, etc., v. First Nat'l Bank, etc., *et al.*

ceded, also, that, in the hands of the original judgment creditors, equity might have enforced the lien of the judgments, for the appellee's protection, against No. 2 alone.

In Bispham's Principles of Equity, section 27, it is said: "The doctrine of marshaling grows out of the principle that a party having two funds to satisfy his demand shall not, by his election, disappoint a party who only has one fund. Thus, a party who has a mortgage on two parcels of land, ought not, in fairness, to resort in the first instance to one of them, upon which there also happens to be a junior mortgage which is not otherwise secured; for in so doing the junior mortgagee might be altogether cut out. Equity, however, is loath to interfere with the rights of a creditor to enforce payment out of any of his securities, and therefore the remedy usually afforded to the junior disappointed mortgagee is to substitute him to the rights of the paramount mortgagee as against the other property." The same proposition is announced and illustrated by the author in section 340, *et seq.*, of the same work. In section 341 it is said that "the equity of marshaling would seem to be capable of being carried into effect in one of two ways, either, first by restraining the party against whom it exists from using a security to the injury of another, or, second, by giving the party entitled to the protection of this equity the benefit of another security in lieu of the one of which he has been disappointed. In other words, the right might be enforced either by injunction against the paramount creditor, or by subrogation in favor of the junior creditor." In the same section it is further said: "The rights of every one can be protected, and there is no harm in throwing the paramount creditor at once on the singly charged fund. So, too, when the paramount creditor

Bank of Commerce, etc., v. First Nat'l Bank, etc., *et al.*

has been guilty of some negligence or default, as where he has put one of the funds beyond his own reach with the full knowledge that his debt cannot be satisfied out of the other fund without injury to the interests of third persons, he may be restrained from coming in upon the second fund."

In Fetter on Equity, p. 256, it is said "that a person having resort to two funds shall not by his choice disappoint another having one only. The practice adopted in the early days was to summarily forbid the creditor with two funds to touch that which was the sole resource of the other. The remedy by injunction is, however, rarely applied in modern times. The usual course is to permit the double creditor to enforce his claim as he pleases; but, if he chooses to resort to the only fund on which the other has a claim, that other is subrogated to all his rights against the fund to which otherwise he could not have resorted."

In Jones on Liens, sections 1045, the same rules are stated, and wherever stated, are fortified by abundant authority.

One contention on behalf of the appellant is, that while the right to require enforcement of the judgment against No. 2 alone existed at all times, prior to the execution of the trust deed, after that time it did not exist; that the right was not fixed, but was inchoate and to be enforced only with reference to conditions existing at the time of enforcement. If this were true, the rule that subrogation was the more modern and approved remedy would be defeated, since subrogation depends upon the previous conduct of the dominant creditor, either in disregarding his duty to seek the property not covered by the junior lien, and in enforcing it against that upon which the junior lien rests, or, as said by Bispham, where he "has been guilty of some negligence or default." The

Bank of Commerce, etc., v. First Nat'l Bank, etc., *et al.*

theory of subrogation would be incomplete without the supposition that the dominant creditor had either enforced his claim against the doubly burdened property, or had lost the right to pursue the property to which equity carries the junior lien in subrogation. The idea at the basis of the equity is that the dominant creditor, having otherwise ample security, shall not disappoint the junior creditor. Unless that which disappoints the junior creditor has been done there is nothing for which subrogation is awarded. To give the disappointed creditor "the benefit of another security in lieu of the one of which he has been disappointed," necessarily implies that he has been placed in a position by the dominant creditor where his security is not available. Bispham says, section 342, that "the right of marshaling cannot be defeated by the intervention of creditors of a later date," citing authority. We are convinced, therefore, that where, as in this case, a creditor takes a mortgage on property, it then being apparent that all prior liens can be fully paid from other property covered by them, the right to require such payment will continue and be protected as against such prior liens.

It is insisted, however, that the enforcement of the rule under the circumstances in this case is an injury to the appellant, now the dominant creditor by the purchase of the judgments, and that equity will not enforce the rule to the injury of a third person. As to the ownership of the judgments, we observe no stronger equity in the appellant than in the assignor, the original judgment creditor. Nor do we perceive that the trust deed added anything to the equities of the appellant, under the judgments, as against the appellee. Equity forbade the assignor of the judgments to enforce them so as to disappoint the appellee. In other words, good faith demanded that the

Bank of Commerce, etc., v. First Nat'l Bank, etc., *et al.*

judgments should be enforced against No. 2, property encumbered only by their lien and ample to pay them. We know of no reason why this equity should be broken by the transfer of the judgments to another. The judgment creditor could perform no act affecting the equity in favor of the mortgagee. In the hands of the appellant the judgments have been held without enforcement, for the manifest purpose of pushing them over upon No. 1. The trust deed, the sales of property included in No. 2, and the application of the proceeds to credits in favor of the appellant, other than the judgments, have had the effect to remove much of No. 2 from the reach of the judgments, and to destroy, in the main, the possibility of subrogation. In other words, the judgments, as confessed by allegation, were purchased and employed by the appellant for its protection, that is, to secure the payment of its other claims from No. 2, hoping thereby to avoid the obligation to collect the judgments from that property and to be enabled to collect them, or such part as might be necessary, from No. 1. The appellant, as to the judgments, does not occupy the position of a third party; it occupies the position of the original judgment creditor. Nor is it, as the dominant lienor, injured by the rule here in question. If injured, it is not by the rule, but in the violation thereof by the appellant, in securing the diversion of No. 2 to other sources than the payment of the judgments. If, instead of a trust deed for appellant's benefit, Mackey had conveyed No. 2 to a stranger, it would not have been released from the lien of the judgments. If he had sold out a part of it, the residue would have been first subject to sale upon the judgments and then, for any balance, the part sold would have been subject to sale. This conclusion results from the universally

Bank of Commerce, etc., v. First Nat'l Bank, etc., et al.

established equitable rule that property subject to a lien, if sold by the debtor in parcels, is subject to re-sale, for the discharge of the lien, in the inverse order of its alienation. Authorities are unnecessary to a proposition so thoroughly understood as this. The appellee, in taking its mortgage, occupied the position of a purchaser of a part of the property covered by a lien, and was entitled to require the remaining portion to be sold first for the payment of the lien. *Hahn v. Behrman*, 73 Ind. 120; *Merritt v. Richey*, 97 Ind. 236; *Denton v. Ontario, etc., Bank*, 28 N. Y. Supp. 293; *Appeal of Robeson*, 117 Pa. St. 628, 12 Atl. 51; *Kendig v. Landis*, 135 Pa. St. 612, 19 Atl. 1058.

The trust deed and sales under it, for the appellant's benefit, had the effect to release the property from the lien of the judgments, as to the appellant, and such release would operate as a relinquishment of the right to go upon No. 1 for the judgments. *Alsop v. Hutchings*, 25 Ind. 347; *Turner v. Flenniken*, 164 Pa. St. 469, 30 Atl. 486, 44 Am. St. 624.

Cases in their essential features quite like the present are *Appeal of Robeson*, *supra*, and *Kendig v. Landis*, *supra*. In the first, Graham owned two tracts of land subject to two judgments in favor of Woods. Upon the Hale tract he gave two mortgages, and later gave one upon the Decatur tract. Both tracts were sold under the judgments, and the proceeds brought into court for marshaling. The appeal was on behalf of the mortgagees of the Hale tract, claiming precedence in distribution over the mortgage on the Decatur tract. The court said: "If the contest were one between the appellants and the debtor alone, can it be doubted that the appellants would in equity be entitled to have Woods resort to the proceeds of the Decatur tract in order that they might avail themselves of the proceeds of the Hale tract? As the equity is

Bank of Commerce, etc., v. First Nat'l Bank, etc., et al.

against the debtor himself, certainly he would not be allowed to insist upon a *pro rata* payment of the Woods judgments from the two funds respectively, in order that he might pocket part of the money.

"But when the appellees subsequently recorded their mortgage upon the Decatur tract, it is contended that, as mortgagees, they acquired a lien, and that their equity was equal to that of the appellants; that the equities were *in equilibrio*. We do not think so. The appellants acquired against Graham, the mortgagor, the right to have his other lands, not included in the mortgage, applied first to the payment of the earlier judgments which were liens against them. This right it was not in the power of the mortgagor to defeat by confessing judgments to other creditors, or by contracting subsequent debts. *Bona fide* purchasers, and perhaps mortgagees, might be unaffected by an equity of which they had no notice in fact. *Hoff's Appeal*, 84 Pa. St. 42. But when the appellees took their mortgage they could plainly see that the Woods judgments were entered as first liens against the Decatur tract, and that their mortgage in the regular course of distribution, could not be paid until these judgments were satisfied. It is true that it appeared by the records that the Woods judgments were liens also upon the Hale tract, but the same search would show the existence of the appellants' mortgage. The appellees, in the absence of proof to the contrary, will be presumed to have taken their mortgage with full knowledge of all the facts disclosed by the record, and would thus be affected with notice of all the equities, which, owing to the peculiar condition of the respective liens, the appellants had as against the Woods judgments."

From the case of *Kendig v. Landis*, *supra*, we quote as follows: "The appellant has two funds out of

Bank of Commerce, etc., v. First Nat'l Bank, etc., *et al.*

which to claim his money. One of the funds is the proceeds of the sale of the Manor township farm, which was sold by the sheriff for a sum sufficient to pay appellant's judgment in full. The money is in the hands of the sheriff, but the appellant declines to take it out. The other fund is the proceeds of the sale of the Millersville property. This property was sold by the sheriff subsequently to the sale of the Manor farm. The mechanics' lien creditors have a claim upon this fund, but they are subsequent to the lien of the plaintiff's judgment. The appellant insists upon his right to take his money out of the latter fund. If he succeeds, he takes the only fund the mechanics' lien creditors have.

"The application of the familiar rule that where one creditor has two funds out of which to make his money, and another creditor has but one, the creditor having the two shall first exhaust the fund upon which the other has no claim, would throw the appellant upon the Manor farm. This rule must prevail, unless the appellant has an equity which would make the application of the principle unjust in the particular instance. The reason why he objects to it is that he is the holder of a second judgment which is also a lien upon the two properties, but as to the Millersville property, it is subsequent to the mechanics' claims. Hence, he desires to first absorb the Millersville fund, in which case his second judgment is good upon the Manor farm. In this, however, he has no equity. When the mechanics put their work and materials upon the Millersville property, they could see, of course, that it was bound by the lien of appellant's first judgment. But they also knew that the same judgment was a lien on the Manor farm, and that said farm was amply sufficient to pay it. With this knowledge, they had a right to expect that the appellant

State, *ex rel.* McWylie, Trustee, *v.* Mathews, Auditor.

would seek to get his money out of the farm, and not deprive them of the security of their liens. They further knew that they could compel him to do so if necessary. Is this right to be taken away because the appellant acquired another judgment which was also a lien upon both properties, and which was entered after the mechanics' liens had attached to the Millersville property? The appellant has no equity as to his second judgment, for the reason that it is subsequent to the mechanics' liens, and he cannot, by tacking his two judgments together, deprive the mechanics of their equity to have the first judgment satisfied out of the Manor farm."

Counsel for appellant rely with confidence upon *Gilliam v. McCormack*, 85 Tenn. 597, 4 S. W. 521. We make no effort to distinguish between that case and the general rules and authorities upon which we rely for our conclusion. It seems to support the appellant's contention, but, with deference, we submit that the weight of authority, and the necessary force of the rule of equity involved, lead to the conclusion we have reached. The rulings of the lower court were correct. The judgment is affirmed.

STATE, EX REL. MCWYLIE, TRUSTEE, *v.* MATHEWS,
AUDITOR.

[No. 18,514. Filed May 24, 1898.]

SCHOOLS.—*Apportionment of School Revenue by County Auditor.*—

A township is not entitled to any of the school fund collected from the tax assessed under the general law so long as the interest on the congressional fund of such township alone amounts to more per capita than was left in the hands of the county auditor to apportion to other townships. *pp.* 598, 599.

SAME.—*Apportionment of School Revenue.*—The common school fund derived from other sources than interest on the congressional township fund, may be validly and constitutionally unequally distributed

State, *ex rel.* McWylie, Trustee, *v.* Mathews, Auditor.

by statutory authority, so as to make the whole, including the congressional township fund, when distributed, as nearly equal per capita to each school corporation as possible. *p. 600.*

From the Monroe Circuit Court. *Affirmed.*

Louden & Louden, for appellant.

J. E. Henley and *J. B. Wilson*, for appellee.

MCCABE, J.—The appellant's relator as trustee of Perry school township in Monroe county, in the name of the State, sued appellee as auditor of Monroe county for a writ of mandate to compel the distribution of school funds to said Perry township. Many questions arose by rulings on demurrers to the complaint, answers, and replies, but all of such, and the same questions again arise on appellant's exceptions to the conclusions of law, stated by the court on the special finding of facts. Pursuant to such conclusions of law, the peremptory writ was refused, and final judgment rendered in favor of the defendant. Error is assigned upon the conclusions of law among other things. We therefore need only examine the questions arising upon such conclusions of law. So much of the substance of the special finding as is material is as follows: That in 1895 there was assessed on the real estate and personal property of Perry township under the general law for school purposes \$957.86, half of which sum was paid in the first installment of taxes in March and April, 1896, and the other half was paid in November next following; that said auditor in making the apportionment of the school revenue on the last Monday of January, 1897, refused to apportion to said township any part of said second installment, and, on demand of relator, refused to apportion any of said sum to said township of Perry; that the interest on the congressional township fund belonging to said township of Perry in the hands

State, ex rel. McWylie, Trustee, v. Mathews, Auditor.

of said county auditor at the time he made said apportionment, in January, 1897, amounted to \$525.39, which sum was by said auditor paid to said relator at the time of making said apportionment, and said auditor refused to apportion any other or additional sum to said township except \$38.51, the proportion of liquor license fund due said township, which he paid to said relator; that the entire common school fund for distribution in Monroe county in January, 1897, exclusive of said congressional township fund belonging to said Perry township, was \$8,328.11; at the same time the children of school age in said county, exclusive of the children of such age in said Perry township, numbered 5,926.

The conclusions of law are that the interest on the congressional fund belonging to Perry township alone amounted to more *per capita* for the school children of said township than the entire residue of the common school and congressional school fund would amount to for the school children of the other townships of said county; that said Perry township was not entitled to any of the school fund collected from the tax assessed under the general law, so long as the interest on her congressional fund alone amounts to more *per capita*, as appears by the facts found, than was left in the hands of the county auditor to apportion to the other townships. That therefore the law is with the defendant.

The statute authorized the distribution just as the auditor has made it, and in accordance with the conclusions of law stated by the court. Section 5973, Burns' R. S. 1894 (4486, R. S. 1881).

It is conceded that to divide the entire common school fund of the county, including the congressional township fund, it would only make \$1.41 *per capita* for the children thereof of school age. And it is

Wood, Administratrix, v. Wood.

further conceded that the congressional township fund alone of Perry township, makes \$1.45 *per capita* for the children of school age in said township. That makes a larger fund than the other townships have.

The only reason why in attempting to equalize the distribution of the school fund by the State a portion of this may not be taken away, is that the terms of the congressional grant by which it was created forbid it. *Davis v. State, ex rel.*, 44 Ind. 38-47; *Board, etc., v. State, ex rel.*, 116 Ind. 329; *State v. Springfield Township*, 6 Ind. 83. But it is settled law in this State that the common school fund derived from other sources may be validly and constitutionally unequally distributed by statutory authority, so as to make the whole, including the congressional township fund, when distributed, as nearly equal *per capita* to each school corporation as possible. *Quick v. Whitewater Township*, 7 Ind. 570; *Quick v. Springfield Township*, 7 Ind. 636; *State, ex rel., v. McClelland, Tr.*, 138 Ind. 395-407. The conclusions of law were accordingly correct. The judgment is affirmed.

WOOD, ADMINISTRATRIX, v. WOOD.

[No. 18,626. Filed May 24, 1898.]

DECEDENTS' ESTATES.—*Administrator's Sales.*—*Parties.*—The administratrix of a deceased heir is not a necessary party in a proceeding to sell the ancestor's real estate for the payment of debts of such ancestor, and the failure to make her a party will not entitle her to attack the judgment and sale of the land in a collateral action, as such administratrix, as against the purchaser, where the administratrix was the widow and only heir of the deceased heir, and was made a party to such proceeding as such heir.

From the Decatur Circuit Court. *Affirmed.*

J. K. Ewing, J. D. Wallingford and C. H. Ewing,
for appellant.

Cortez Ewing and Davison Wilson, for appellee.

Wood, Administratrix, v. Wood

JORDAN, J.—This action was commenced by the appellant, Mary M. Wood, as administratrix of the estate of her husband, Alpheus C. Wood, against the appellee, to enforce partition of an undivided interest of which it is alleged her said decedent died seized, and which it is averred will be necessary for her to sell to pay the debts and claims against his said estate. There was judgment in favor of the appellee upon demurrer, and the errors assigned are the overruling of the demurrer to the second paragraph of answer, and the sustaining of the demurrer to appellant's reply.

The material facts, as they appear from said paragraph of answer and the reply, are, in substance, as follows: In 1895, Asa Wood died, intestate, at Decatur county, Indiana, the owner in fee simple of the real estate involved in this action, situated in said county. He left no widow, but left surviving him several children. Among the number was appellant's decedent, Alpheus C. Wood. John A. Wood was by the Decatur Circuit Court appointed the administrator of the estate of Asa Wood, deceased, and was duly qualified as such. After the death of Asa Wood, his said son, Alpheus C. Wood, died intestate, leaving Mary M. Wood as his widow and only surviving heir. Subsequent to the death of Alpheus, the administrator of the estate of Asa Wood filed his petition in the Decatur Circuit Court to sell the lands in dispute for the purpose of paying the debts and claims existing against the estate of his decedent. All of the heirs of the said intestate were made parties to this proceeding, and the said Mary M. Wood was also made a party to said action, as the widow and heir of her deceased husband, Alpheus C. Wood. All of the defendants entered their appearance to the action to

Wood, Administratrix, v. Wood.

sell, and filed their written consent to the sale of the lands. The appellant, at the time the administrator of Asa Wood instituted his proceedings to sell the real estate, was the administratrix of the estate of Alpheus C. Wood, whose estate at that time it is alleged was insolvent, but she, as such administratrix, was not made a party defendant to the petition to sell. The administrator, under his said proceedings, secured an order of the court to sell the land in controversy, and duly complied with said order by selling and conveying it to the appellee herein, which sale and conveyance was duly approved and confirmed by the court.

The contention of counsel for appellant is that by reason of the fact that she was not made a party in her capacity as administratrix of Alpheus C. Wood's estate, to the petition to sell the lands of his father, that she is not bound by the judgment of the court in that action, and is therefore entitled to attack the judgment in this collateral action, and have the interest of her decedent, as the heir of Asa Wood, in and to the real estate in question, partitioned and sold for the payment of the debts of her said decedent. It is evident that this contention has no legal support and cannot be sustained. They urge upon our consideration, in support thereof, the well settled rule that parties are only bound by a judgment in the capacity in which they are sued, but this principle can have no application under the facts in this action. At the death of Asa Wood the real estate which he then held and owned descended, it is true, to his children, subject, however, to the payment of all the just debts and claims that existed against him at his death, or that might properly accrue against his estate after his decease and before the final settlement of his estate. In contemplation of law, if it were necessary to sub-

Wood, Administratrix, v. Wood.

ject his realty to a sale in order to pay and discharge such debts and claims, it remained the property of his estate for that purpose, and his administrator, under his petition to sell, it seems, from an inspection of said petition, which was filed as an exhibit in this action, proceeded properly upon the theory that the lands belonged to the estate of his decedent and were subject to be sold for the payment of the debts or obligations existing against such estate. Section 2491, Burns' R. S. 1894, declares who are necessary parties to an administrator's petition to sell, and who are proper parties to such proceedings. The widow, if any, and the heirs, must be made, and are necessary defendants. It is essential that the heirs be made party defendants that they may have an opportunity to resist the prayer of the petition, and, in the event of a sale, that they may be estopped to claim title to the land as such heirs against the purchaser. *Sherry v. Denn*, 8 Blackf. 542; *Kent v. Taggart*, 68 Ind. 163.

In the event the administrator does not seek to sell the realty of his decedent free from liens, then, and in that event, only such lien holders whose liens he may have reasons to believe are invalid or are discharged in whole or in part may, and should be made, parties to the said action. Holders of valid liens, and persons claiming an interest in, or lien upon, the lands, may, at the instance of the administrator, or upon their own application, be made parties to the proceedings. They are, however, not necessary parties in order to give the court jurisdiction to decree the sale of the land and pass the title of the decedent to the purchaser at such sale. *Lantz v. Maffett*, 102 Ind. 23; *Bumb v. Gard*, 107 Ind. 575; *Thomas v. Thompson*, 149 Ind. 391.

Appellant, in her capacity as the heir of her deceased husband, whose interest in his ancestor's lands

Wood, Administratrix, v. Wood.

she had acquired as such heir, subject to the payment of the debts of such ancestor's estate, was necessarily made a party. She stood in the shoes of her husband in respect to his interest, and was bound by the judgment in like manner as he would have been bound had he been in life and made a party to the proceedings. Certainly, however, appellant was not authorized or empowered under the law, as the administratrix of Alpheus C. Wood, to subject his undivided moiety or interest in the lands in controversy to a sale for the payment of the debts or claims against his estate, so long as such lands were necessarily required to be sold in order to make assets for the payment of the debts and claims against the estate of such ancestor. Under such circumstances, after the sale of the land, her remedy would be to make application for the moiety of the purchase money remaining after the payment of all debts and claims for which the land had been sold, to which she might be entitled, either as the widow, or as the personal representative of her decedent.

It is manifest, therefore, that appellant, as administratrix, was not a necessary party to the petition to sell, and the failure to make her a defendant in such proceedings will not entitle her to collaterally attack the judgment and the sale of the land, as against the appellee, who became the purchaser thereunder, and holds the realty in dispute by virtue thereof. There is no error in the record, and the judgment is therefore affirmed.

Nutter *et al.* v. Hendricks *et al.*

NUTTER ET AL. v. HENDRICKS ET AL.

[No. 18,884. Filed June 7, 1898.]

PLEADING.—*Action.—Ejectment.—Trespass.—Necessary Allegations.*—

An action based upon a paragraph of complaint stating facts sufficient to constitute an action for trespass, damage, and for an injunction, and which does not allege that plaintiff was entitled to the possession of the premises described, nor that the defendant unlawfully kept him out of the possession thereof, will be held to be an action for trespass, and not an action to recover the possession of the real estate. *pp.* 606, 606.

NEW TRIAL.—*Quieting Title.—Joinder of Causes of Action.—New Trial as of Right.*—Where a paragraph of complaint for the possession of real estate, or to quiet the title thereto, is joined in the same complaint with one for any other cause of action, a new trial as of right, under section 1077, Burns' R. S. 1894, is not permitted. *pp.* 606, 607.

From the Morgan Circuit Court. *Affirmed.*

W. R. Harrison, Shirley & Parks and John C. Robinson, for appellants.

C. G. Renner and Oscar Matthews, for appellees.

MCCABE, J.—The appellants sued the appellees in a complaint of two paragraphs. A trial of the issues by the court without a jury resulted in a finding and judgment for the defendants on the first paragraph of the complaint, and for the plaintiffs for \$100.00 damages on the second paragraph. The circuit court overruled appellants' motion for a new trial as of right under the statute. Section 1077, Burns' R. S. 1894 (1065, R. S. 1881). Error is assigned on that ruling only. The first paragraph of the complaint, being for the recovery of the possession of real estate, would, in the absence of any other paragraph, entitle the plaintiff to a new trial as a matter of right, without cause, under the statute cited. And so, if the second paragraph was for the recovery of said possession, or to quiet title, then the whole case made by

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Nutter et al. v. Hendricks et al.

the whole complaint would be one where a new trial, as a matter of right, was demandable. Section 1076, Burns' R. S. 1894 (1064, R. S. 1881). It is contended by appellants that the second paragraph was also to recover possession of the same real estate, and to quiet their title therein. The paragraph was sufficient as a paragraph for trespass, damage, and for an injunction, but it was evidently never intended by the pleader as a paragraph either to recover possession or to quiet appellants' title. The first paragraph covered all that ground, and both paragraphs had reference to the same real estate. The second paragraph did not allege that the plaintiffs were entitled to the possession of the premises described, nor that the defendants unlawfully keep them out of possession. The statute requires these two allegations to be made in the complaint for possession, without either of which it is fatally defective. Section 1066, Burns' R. S. 1894 (1054, R. S. 1881). *Pittsburg, etc., R. W. Co. v. O'Brien*, 142 Ind. 218, and cases there cited. The statute requires a complaint to quiet title to allege that the defendant claims title to or an interest in the real estate adverse to the plaintiffs, and that such claim is unfounded. Section 1082, Burns' R. S. 1894 (1070, R. S. 1881). *Second National Bank v. Corey*, 94 Ind. 457; *Conger v. Miller*, 104 Ind. 592. The second paragraph of the complaint must be construed as its general tenor indicates, as a paragraph seeking damage for a trespass and an injunction. Such paragraph is in no sense one seeking the recovery of the possession of real estate, or to quiet title to such real estate; and no right to a new trial without cause shown, in such a case is allowed or provided for by any statute or law of this State. And it is settled law in this State that where a paragraph of complaint for possession of, or to quiet title to real estate, is joined

The State, ex rel. Burroughs, v. Webster et al.

in the same complaint with one for any other cause of action, a new trial as of right, under the statute cited, is not demandable. And especially is this so where such joinder of a cause in which a new trial as of right is allowed by the statute with one where such new trial is not allowed, has been so joined by the defeated plaintiff. He has no one to blame but himself for his failure to get a new trial of his cause for possession and to quiet title. He himself joined it with a cause in which the law would not allow him a new trial without cause; and the new trial must be granted as to the whole case, or refused as to the whole case. If the complaint embraces a cause of action other than one for possession of, or to quiet title to real estate, then the cause is not one to quiet title to, or recover possession of real estate, even though there be one or more paragraphs of that character in the complaint. And if the whole case made by the complaint is not one to recover possession of, or to quiet title to real estate, or both, then a new trial without cause shown is not provided for or allowed by law. *Bradford v. School Town of Marion*, 107 Ind. 280; *Butler University v. Conard*, 94 Ind. 353; *Richwine v. Presbyterian Church*, 135 Ind. 80-86; *Thompson v. Kreisher*, 148 Ind. 573. Therefore, the circuit court did not err in overruling appellants' motion for a new trial as of right, and without cause shown. The judgment is affirmed.

Jordan, J., did not participate in this decision.

THE STATE, EX REL. BURROUGHS, v. WEBSTER ET AL.

[No. 18,598. Filed June 7, 1898.]

PHYSICIANS.—*License.—Evidence—Statute Construed.*—Under sections 2 and 5 of the act of March 8, 1897, providing the manner in which a physician holding a license to practice medicine under the preceding law may procure a new license and continue in the practice, the former license is only *prima facie* evidence of the right to a new one. p. 613.

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The State, *ex rel.* Burroughs, *v.* Webster *et al.*

PHYSICIANS.—License.—Revocation.—The provisions of section 5 of the act of March 8, 1897, that a physician guilty of certain misconduct may have his license revoked by the State Board of Medical Registration and Examination, has no application to licenses issued under a former act to regulate the practice of medicine. *pp.* 613, 614.

SAME.—License.—Revocation.—Notice.—The act of March 8, 1897, to regulate the practice of medicine, revokes by implication all former licenses held by physicians, and one who applies for a new license takes notice of whatever action the board may take thereon. *pp.* 614, 615.

SAME.—License.—Constitutional Law.—Police Power.—The act of March 8, 1897, making it unlawful to practice medicine without a license, and denying to all physicians in the State, lawfully engaged in the practice, the right to continue such practice, until they conform to the requirements of the statute, and restricting the practice of medicine to persons who are able to demonstrate their qualifications to the State Board of Medical Registration and Examination created by the act, is constitutional, being a proper exercise of the police power of the State. *pp.* 615-621.

SAME.—Board of Registration and Examination Not a Judicial Body.—The State Board of Medical Registration and Examination, which, under the act of March 8, 1897, passes upon the qualifications of applicants for licenses to practice medicine, is not a judicial body, though the statute provides for an appeal from the decision of such board. *p.* 621.

From the Marion Superior Court. *Affirmed.*

Byron K. Elliott, William F. Elliott, James W. Noel and Frank J. Lahr, for appellant.

William A. Ketcham, Attorney-General, and Merrill Moores, for appellees.

HOWARD, J.—This was an action brought by the relator, in the name of the State, for a writ of mandate, to require the appellees, who constitute the State Board of Medical Registration and Examination, to issue to him a certificate entitling him to a license to practice medicine, under the provisions of an act of the General Assembly regulating the practice of medicine, and for other purposes, approved March 8, 1897. Acts 1897, p. 255; section 5352a, Horner's R. S. 1897, and following sections. On the issue of an alterna-

The State, *ex rel.* Burroughs, *v.* Webster *et al.*

tive writ, as prayed for, the appellees made return, and to this return the relator filed his demurrer. A supplemental return was also made to the alternative writ, to which exceptions were filed. A demurrer was also filed to the return as a whole, including the supplemental return. Both demurrers were overruled, as were also the exceptions to the supplemental return. Judgment was then entered, that the relator take nothing by his action.

In his complaint the relator recites that he has been practicing medicine in Indiana continuously since September 19, 1896, under a license regularly issued on that day by the clerk of the Marion Circuit Court, according to the law regulating the practice of medicine in force prior to the act of 1897. Acts 1885, p. 197, section 7318, *et seq.*, Burns' R. S. 1894. In his complaint he also sets out his application and affidavit for a certificate to practice medicine under the new law, showing that he was a graduate, in 1893, of the American Eclectic Medical College of Cincinnati, and in 1897 of the American Medical College of Indianapolis. He also exhibits an affidavit filed with the board to the effect that he has not been guilty of felony or gross immorality, and is not addicted to the liquor or drug habit, and that his general reputation for moral character is good. He also recites a tender to the board of a dollar as a license fee, as provided in the act, and says that he has repeatedly demanded a certificate, and that the board has refused to issue him one, and he prays an alternative writ of mandate, requiring the defendants to issue him a certificate entitling him to a license to practice medicine.

The appellees, in their return, set up, in brief, that they have been delayed in acting upon relator's application, by reason of the great amount of work re-

The State, ex rel. Burroughs, v. Webster et al.

quired for the satisfactory discharge of their duties; that they have been notified verbally that charges would be filed against the relator, and for that reason have postponed action upon his case, which is still pending.

In the supplement to the original return, filed a day or two thereafter, it is averred that on October 19, 1897, written charges were filed with the board in the matter of the application of John A. Burroughs for a certificate entitling him to be licensed to practice medicine, charging that the licenses received by him on September 19, 1896, and March 26, 1897, were obtained by misrepresentation as to the character of the colleges upon whose diplomas the licenses were granted, and that he has been and is guilty of gross immorality in seeking and obtaining medical practice by false and fraudulent representations as to his ability to effect cures, and by falsely and fraudulently guaranteeing cures, and that he is also guilty of gross immorality in circulating indecent and obscene literature through the mails and through the community; and the return further shows that, upon the filing of duly verified charges, as shown, the board set a date for the hearing and determination of the charges, and immediately served a copy of the charges upon the relator, with written notice upon him of the time and place of the hearing.

The provisions of the act of 1897 which affect the questions raised in this case are found in sections 1, 2, and 5. Section 1 provides: "That it shall hereafter be unlawful for any person to practice medicine, surgery or obstetrics in this State without first obtaining a license so to do, as hereinafter provided." In section 2 it is provided that any person desiring to begin the practice of medicine, surgery or obstetrics shall procure from the State board a certificate

The State, *ex rel.* Burroughs, *v.* Webster *et al.*

that he is entitled to a license. In order to procure such certificate the applicant shall submit to the board his diploma, with his affidavit setting forth the time and under what circumstances it was received and that he is the person to whom it was issued. His identity as the person to whom the diploma was issued is to be further corroborated by the affidavit of two freeholders. Provision is also made for the examination of any applicant whose diploma is from a college not recognized by the board as maintaining a sufficiently high standard of medical education. Further provision is made in this section for the giving of certificates to persons already engaged in the practice of medicine under former laws. Upon the receipt of the certificates from the board and the presentation of the same to the county clerk, the applicant will be entitled to receive from the clerk the required license. In section 5, amongst other things, it is provided that the board shall fix a schedule of the minimum requirements which must be complied with by applicants for examination for license, and must also establish rules for the recognition of medical colleges, so as to keep the requirements up to the average standard of medical education in other states. In fixing such rules it is expressly provided that the board shall not "discriminate for or against any school or system of medicine." Provision is also made for refusing certificates in certain cases, and also for revoking licenses when granted.

The relator was in the practice of medicine at the time the law of 1897 took effect, under licenses procured under the act of 1885, *supra*. Those licenses he filed with the board, as required by section 2 of the act of 1897; and he claims the right to a certificate under the following provisions of said section: "All persons practicing medicine, surgery and obstetrics in

The State, ex rel. Burroughs, v. Webster et al.

the State of Indiana when this law goes into effect, and desiring to continue the same, shall, within ninety days thereafter, obtain a certificate that they are entitled to do so by presenting to the State Board of Medical Registration and Examination the license possessed by them at the time of the passage of this law, together with an affidavit that they are the legal possessors of the same, and the persons mentioned therein, and such applicant shall pay to the board the sum of one dollar (\$1.00) at the time of making such application. The board shall thereupon issue to such applicant a certificate, which, when presented to the county clerk of the proper county, shall entitle the holder to a license to practice medicine, surgery and obstetrics in the State of Indiana." If the foregoing provisions were all that were contained in the act in relation to persons already in the practice of medicine at the date of the approval of the law, there is no doubt that the relator would have been entitled to the writ of mandate asked for. The act would then mean that anyone already practicing medicine by virtue of a license issued under the old law, would be entitled to a certificate and license, to be issued under the new law. The simple fact that a license had been given under the old law would be the only evidence needed to entitle him to a license under the new law. And this is what the relator contends for. But there are provisions in section 5 of the act which materially modify the foregoing provisions of section 2, as follows: "The State Board of Medical Registration and Examination shall have the right to review the evidence upon which a license has been obtained, and if it shall be found that a license has been obtained by fraud or misrepresentation, the board may revoke such license. The board may refuse to grant a certificate to any person guilty of felony or gross immorality, or

The State, ex rel. Burroughs, v. Webster et al.

addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery, and may, after notice and hearing, revoke a certificate for like cause. An appeal may be taken from the action of the board." These words certainly authorize the board to do something more than merely inspect the old license before they issue the certificate for a new one. Under those sweeping provisions, the old license is merely *prima facie* evidence of a right to the new one. The board, in effect, is given authority to inquire whether the former license was rightfully obtained; and, even then, if the applicant is an unfit person to practice medicine, by reason of criminal conduct or immoral character or habits, the board may refuse a certificate. Moreover, after the giving of the certificate, provided no license has been issued upon it, the board may, after notice and hearing, revoke the same. To protect the applicant from any injustice on the part of the board, in so refusing or revoking a certificate, the act provides for an appeal. The tribunal of appeal, though not named in this section, is the circuit or superior court of the proper county, the county of the applicant's residence, as shown in section 2 of the act.

It thus appears, when all the sections of the act, particularly sections 2 and 5, are read together, as they must be, that the relator's licenses issued to him under the act of 1885, did not necessarily entitle him to a certificate from the board, unless the board were also satisfied, upon examination, that such licenses were obtained without fraud or misrepresentation, and, besides, that the applicant was morally a fit person to engage in the practice of medicine.

As to "any person holding a license under the provisions of this act" (the act of 1897), if he be guilty of any of the acts of immorality or other wrong doing

The State, ex rel. Burroughs, v. Webster et al.

named in section 5, it is further provided that such license "may be revoked by the board, upon the finding and judgment" of the circuit court. This provision, however, has no application to such a case as that before us, where the relator's license was granted, not under this act, but under a former law. The act of 1897, in effect, revoked such former license, as appears from section 1, above set out; and the new license can be issued in its place only in the manner set forth in the act itself. The board may revoke its own certificate, on notice and hearing, before a license has issued thereunder; but, if the license has actually issued under the new law, then it can be revoked only on the finding and judgment of the court. The appellant is therefore in error in contending that any finding or judgment of a court is necessary to the revoking of a license granted under the old law: Such license, as already said, was revoked by the law itself, in the act of 1897, and remains in force only until the board has acted upon the application for the new license. If the new license is granted, it takes the place of the old one. If it is refused, the applicant has no right to practice medicine, unless, on appeal to the court from the action of the board, the board is required to issue a license.

Whether the law is a wise one is not for the courts to say. It may be, as contended, that as men are free to choose those who shall minister to the needs of the soul, so also should they be free to choose those who shall minister to the ills of the body. It may be that such laws repress independent investigation, and so retard the progress of medical knowledge. It may be that many of the most valuable medical discoveries were made in spite of the prejudice and protest of men learned in the old and time-tested lore of their day. It may be, finally, that such laws are out of har-

The State, *ex rel.* Burroughs, v. Webster *et al.*

mony with our free institutions, according to which each citizen may pursue his own work, his own studies, his own occupation, in so far as he does not trench on the equal rights of his fellows and the welfare of the community in which he lives. These are, however, questions for the legislature; and, so long as the act is not clearly in violation of any provision of the constitution, it cannot be held invalid. The legislature has judged that the safety of the public health requires the guards that are placed around the practice of medicine by this law; and, notwithstanding the questions made by counsel, we are unable to see that the act is not a valid exercise of the police power of the State. Had the board refused to act on the application of the relator, he could undoubtedly have compelled action. But the petition for mandate is not to compel the board to act on his application, but to compel it to grant him a certificate for a license. This, under the act, as we have seen, he cannot compel the board to do. The board must act after investigation, and then grant or refuse the application as may be found right. In case of refusal, the statute gives the right of appeal. The relator has therefore no cause to complain.

We do not understand what failure as to notice is shown in the statute. The statute itself is notice that the legislature has set aside the old licenses, and given a reasonable time in which to apply for new licenses in their place. The applicant for a new license has presented himself before the board, and of course must be held to have notice of whatever disposition the board may make of his application. In case he is granted a certificate, and the board sees fit to revoke it before he has procured his license, notice and a hearing are provided for. And if he actually receives his license, it cannot be revoked un-

The State, *ex rel.* Burroughs, *v.* Webster *et al.*

til a formal action is had in court, including the filing of a verified charge against him, by way of complaint, followed by summons, finding and judgment. There is no failure of notice. Indeed, the statute of 1897 is a much more guarded and limited exercise of the police power in relation to the licensing of ~~physicians~~ **than** many that have been upheld by the courts as valid and constitutional. As said by counsel for appellees: "Statutes similar to the one under consideration, denying to all physicians in the state, lawfully engaged in practice, the right to continue such practice, until they conform to the requirements of the statute, and restricting the practice of medicine to persons who are able to demonstrate their qualifications, have been held constitutional as a proper exercise of the police power of the state in nearly every state of the union and in the Supreme Court of the United States. *Eastman, v. State*, 109 Ind. 278, 58 Am. Rep. 400; *Dent v. West Virginia*, 129 U. S. 114; *State v. Dent*, 25 W. Va. 1; *Ex parte Frazer*, 54 Cal. 94; *Harding v. People*, 10 Colo. 387, 15 Pac. 727; *Williams v. People*, 121 Ill. 84, 11 N. E. 881; *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923; *State v. Mosher*, 78 Iowa 321, 43 N. W. 202; *Iowa Eclectic Medical College v. Schrader*, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355; *Driscoll v. Commonwealth*, 93 Ky. 393, 20 S. W. 431; *Hewitt v. Charier*, 16 Pick. 353; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888; *State v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *State v. State Board of Medical Examiners*, 34 Minn. 387, 26 N. W. 125; *State v. Fleischer*, 41 Minn. 69, 42 N. W. 696; *Craig v. Board of Medical Examiners*, 12 Mont. 203, 29 Pac. 532; *State v. District Court*, 13 Mont. 370, 34 Pac. 609; *Dogge v. State*, 17 Neb. 140, 22 N. W. 348; *Gee Wo v. State*, 36 Neb.

The State, *ex rel.* Burroughs, *v.* Webster *et al.*

241, 54 N. W. 513; *Ex parte Spinney*, 10 Nev. 323; *In re Roe Chung* (N. M.), 49 Pac. 952; *In re Smith*, 10 Wend. (N. Y.) 449; *People v. Fulda*, 52 Hun 65, 4 N. Y. Supp. 945; *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32; *State v. Call* (N. C.), 28 S. E. 517; *France v. State* (Ohio), 47 N. E. 1041; *Barmore v. State Board Medical Examiners*, 21 Or. 301, 28 Pac. 8; *State v. Randolph*, 23 Or. 74, 31 Pac. 201, 37 Am. St. 655; *Logan v. State*, 5 Tex. App. p. 306; *People v. Hasbrouck*, 11 Utah 291; *Fox v. Territory*, 2 Wash. T. 297; *State v. Carey*, 4 Wash. 424, 30 Pac. 729.

"Similar statutes have been construed and recognized as the law in cases where their constitutionality was not questioned, as follows: *Richardson v. Dorman's Executrix*, 28 Ala. 679; *State v. Fussell*, 45 Ark. 65; *Richardson v. State*, 47 Ark. 562, 2 S.W.187; *Thompson v. Hazen*, 25 Me. 104; *Bibber v. Simpson*, 59 Me. 181; *Spaulding v. Alford*, 1 Pick. 33; *State v. State Board of Health*, 103 Mo. 22, 15 S. W. 322; *Gage v. Censors*, 63 N. H. 92, 56 Am. Rep. 492; *Weeden v. Arnold* (Okl.), 49 Pac. 915; *Haworth v. Montgomery*, 91 Tenn. 16, 18 S. W. 399; *Townshend v. Gray*, 62 Vt. 373, 19 Atl. 635.

"Similar statutes have been sustained for the regulation of the practice of dentistry. *Wilkins v. State*, 113 Ind. 514; *Gosnell v. State*, 52 Ark. 228, 12 S. W. 392; *State v. Creditor*, 44 Kans. 565, 24 Pac. 346, 21 Am. St. 306; *State v. Vandershuis*, 42 Minn. 129, 42 N. W. 789.

"It has been held that the practice of pharmacy may be similarly regulated. *Hildreth v. Crawford*, 65 Ia. 339, 21 N. W. 667; *People v. Moorman*, 86 Mich. 433, 49 N. W. 263; *State v. Donaldson*, 41 Minn. 74, 42 N. W. 781; *State v. Forcier*, 65 N. H. 42, 17 Atl. 577. It has been held that the state may regulate the trade

The State, *ex rel.* Burroughs, *v.* Webster *et al.*

of plumbing and limit the privilege of examinations. *Singer v. State*, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044; *People v. Warden*, 144 N. Y. 529, 27 L. R. A. 718, 39 N. E. 686. And also engineers. *Smith v. Alabama*, 124 U. S. 465. And even lawyers. *State v. Gazlay*, 5 Ohio 14; *Goldthwaite v. City Council*, 50 Ala. 486; *Cohen v. Wright*, 22 Cal. 293; *Ex parte Yale*, 24 Cal. 242, 85 Am. Dec. 62.

"In every one of these cases it has been held that it is within the power of the General Assembly to prescribe qualifications for the practice of the professions or trades named, and to regulate and control these professions, even to the point of taking away the right to practice from persons lawfully engaged in the practice who may be deemed insufficiently qualified in the judgment of the board or official to whom the examination of the applicant has been entrusted."

In *Eastman v. State*, *supra*, this court said: "The practice of medicine and surgery is a vocation that very nearly concerns the comfort, health and life of every person in the land. Physicians and surgeons have committed to their care the most important interests, and it is an almost imperious necessity that only persons possessing skill and knowledge should be permitted to practice medicine and surgery. For centuries the law has required physicians to possess and exercise skill and learning, for it has mulcted in damages those who pretend to be physicians and surgeons, but have neither learning nor skill. It is therefore, no new principle of law that is asserted by our statutes, but, if it were, it would not condemn the statute, for the statute is an exercise of the police power inherent in the state. It is, no one can doubt, of high importance to the community that health, limb, and life should not be left to the treatment of ignorant pretenders and charlatans. It is within the power of the

The State, *ex rel.* Burroughs, *v.* Webster *et al.*

legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of reputable, skilled, and learned men."

And, in *Dent v. West Virginia, supra*, it was said by the Supreme Court of the United States: "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may, in many respects be considered a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution

The State, ex rel. Burroughs, v. Webster et al.

established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

“Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treat-

The State, *ex rel.* Burroughs, *v.* Webster *et al.*

ing disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possess such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge of his qualifications." See, also, the very recent case of *Haucker v. People* (U. S.), 18 Sup. Ct. Rep. 573.

While in some respects quasi-judicial, the action of the board is not judicial, any more than is the action of a county surveyor in fixing a boundary line, or of a county superintendent in giving or refusing a teacher's certificate, or the action of numberless other officers or boards in making investigations and decisions in matters committed to them. Neither is the circumstance that an appeal is allowed from a decision of the board an indication that its action is judicial. "The right of appeal from the action of boards

Wood v. Kuper.

in their administrative character," it was said by this court in *Board v. Heaston*, 144 Ind. 583, 55 Am. St. 192, "is frequently conferred by statute. The appeal in such cases is not permitted because the action of the board is considered judicial, but it is granted as a method of getting the matter involved before a court that it may be determined judicially." Judgment affirmed.

WOOD v. KUPER.

[No. 18,625. Filed June 7, 1898.]

150	622
152	104
159	434
150	622
163	408

ADVERSE POSSESSION.—*Survey.*—*Estoppel.*—*Quieting Title.*—Adverse possession of land, continued for twenty years, passes the title thereof to the occupant, in fee simple, as completely as though he had acquired it from the true owner by conveyance, and the fact that such owner submitted to a survey of such lands will not estop him from asserting title to the land under his claim of adverse possession, irrespective of the survey, when the time for appeal therefrom has not expired. pp. 624, 625.

QUIETING TITLE.—*Survey.*—*Consent to Making Survey.*—*Effect Of.*—The fact that a person holding land by adverse possession consented to a survey thereof will not estop the holder from asserting title to the land, regardless of the survey, as the only effect of such consent was to dispense with the notice required by statute. p. 625.

From the Dubois Circuit Court. *Affirmed.*

Cox & Tieman, for appellant.

Bretz & McFall, for appellee.

JORDAN, J.—Appellee sued appellant to quiet his title to the strip of real estate particularly described in his complaint by metes and bounds; being a part of the west half of the southeast quarter, section 32, township 3, south, range 5, west, situated in Dubois county, Indiana. Appellant answered by a general denial, and also filed a cross-complaint whereby she sought to quiet her alleged title to the land in controversy. The case was submitted to the court, and, after hearing the evidence, there was a finding that appellee

Wood v. Kuper.

was the owner of the realty; and, over appellant's motion for a new trial, judgment was rendered accordingly, quieting appellee's title.

The controversy between the parties to this appeal is whether the appellee owns up to what is claimed to be the north line between his land and that of appellant, or whether the land which he owned only extends to a line run by the county surveyor in March, 1895. The evidence shows that about 1837 the county surveyor established a corner, and marked it by a stone, and that this monument, together with an old fence, was recognized by the respective owners of the land as marking the true boundary line. For thirty years and over, prior to the commencement of this action, this fence, it appears, was considered as the dividing line by appellee and his immediate and remote grantors; and they have been in open, continuous and notorious possession of the real estate in question, under a claim of title during said period, and cultivated and improved the land up to the line in dispute; and the appellee, when he purchased from his immediate grantor, seems to have been informed and understood that his purchase extended to this line. It is not controverted but what the evidence shows that appellee had, prior to the survey hereafter mentioned, acquired an absolute title to the land, by reason of adverse possession. In February, 1895, a dispute arose in respect to the boundary line between the parties to this action; and they, together with other owners of land in section thirty-two, consented, in writing, that the county surveyor should run lines and establish corners in said section at his earliest convenience. Consequently, in March following, the county surveyor established corners and ran a line. This line was located by the surveyor south of the old fence line which had been, as heretofore said, recognized as the

Wood v. Kuper.

boundary between the lands owned by the parties to this action. The correctness of the corners and line so established by the surveyor was, it seems, controverted by the appellee; and on the 8th day of April, 1896, he instituted this action to settle the question of title.

The insistence of counsel for appellant is that appellee, by failing to appeal from the survey made in 1895, is bound and estopped thereby from asserting title to the land under his claim of adverse possession. This contention is not tenable. It is true that in case of a statutory survey it is in effect provided by section 8030, Burns' R. S. 1894 (5955, R. S. 1881); that such survey, as between the parties, shall be *prima facie* evidence in favor of the corners and lines so established during the three years allowed for appeal. *Sinn v. King*, 131 Ind. 183. But certainly the survey in question, under the circumstances, during the period allowed for an appeal therefrom by the appellee, could not serve to defeat the title held and acquired by him through adverse possession. *Cleveland v. Obenchain* 107 Ind. 591; *Riggs v. Riley*, 113 Ind. 208; *Russell v. Senior*, 118 Ind. 520.

Adverse possession of land, continued for twenty years, passes the title thereof to the occupant, in fee simple, as completely as though he had acquired it from the true owner by a conveyance at the time of the commencement of his possession. *Wilson v. Campbell*, 119 Ind. 286. It is true, a survey establishes the lines and corners as determined by it; but it neither passes title nor settles the question thereof to the land surveyed. *Russell v. Senior, supra*. In *Cleveland v. Obenchain, supra*, it is said: "A landowner who submits to a survey does not by so doing lose any of his land. In submitting to the survey he does not surrender any valid title that he may have, no matter how

Cincinnati, etc., R. R. Co. v. Cregor, Administratrix.

it may have been acquired. In not objecting to the survey he does not put himself in the position of surrendering his land, or any part of it."

Some stress is laid by appellant upon the fact that appellee gave his written consent that a survey might be made. All the effect that this consent had, was to dispense with the notice required by the statute. See section 8025, Burns' R. S. 1894 (5951, R. S. 1881). The judgment, upon the evidence, under the law, is a correct result, and is therefore affirmed.

CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD
COMPANY v. CREGOR, ADMINISTRATRIX.

[No. 18,178. Filed June 8, 1898.]

PRACTICE.—Harmless Error.—Special Verdict.—Where the facts found in a special verdict are within the issues joined on two paragraphs of complaint, and applicable thereto, error if any in overruling a demurrer to other paragraphs of the complaint is harmless. p. 627.

NEW TRIAL.—Joint Assignment of Error.—Instructions.—Appeal and Error.—Where error is assigned as a cause for a new trial that the court erred in giving instructions three and four, such assignment will not be available if one of the instructions is correct. p. 627.

INSTRUCTIONS.—Witnesses.—Credibility.—Jurors are not authorized to consider any evidence except such as is given at the trial, but they have the right to test its truth and weight by their general knowledge, derived from experience and observation in their relations with others, and an instruction that in determining the credibility of a witness the jury might call to their aid that knowledge of men and their actions acquired by mingling with men, is proper. pp. 627, 628.

INTERROGATORIES TO JURY.—Motion to Require Answer.—Where the answer to an interrogatory to the jury was, "Evidence don't show," the action of the court in overruling a motion to require an affirmative or negative answer cannot be questioned on appeal, where no facts are disclosed by the record on which the jury could have answered such interrogatory affirmatively or negatively. pp. 628, 629.

WITNESSES.—Competency.—Decedents' Estates.—Section 506, Burns'

150 625
152 541

150 625
153 337

150 625
160 540

150 625
161 108

150 625
167 523
168 627

150 625
1170 594

Cincinnati, etc., R. R. Co. v. Cregor. Administratrix.

R. S. 1894, providing that "in all suits in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record whose interest is adverse to such estate, shall not be a competent witness against the estate," does not render the administratrix, who is the widow of decedent, incompetent to testify to matters occurring prior to the death of decedent, in an action for damages for his death, where her interest was not adverse to the estate, and she did not testify against the estate, but in favor of it.

p. 629.

WITNESSES.—Competency.—Decedents' Estates.—Action in Tort.—The provision of section 507, Burns' R. S. 1894, that "in all suits by or against heirs or devisees, founded upon a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of or in right of such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor," is not applicable to an action in tort for damages for the death of decedent. pp. 629, 630.

NEW TRIAL.—Special Verdict.—Motions for Judgment.—Review.—Overruling or sustaining motions for judgment on a special verdict is not a cause for a new trial. The correctness of the rulings on such motions can only be presented by assigning such rulings as error in this court. p. 630.

From the Marion Circuit Court. *Affirmed.*

R. D. Marshall, B. L. Smith, Claude Cambern and D. L. Smith, for appellant.

William L. Taylor and Floyd A. Woods, for appellee.

MONKS, J.—This action was brought by appellee, administratrix of the estate of Theodore Cregor, deceased, to recover damages for an injury causing the death of the said deceased. The complaint was in four paragraphs, and appellant's demurrer to each paragraph for want of facts was overruled. The cause was tried by a jury, and a special verdict returned; and, over appellant's motion for a new trial, judgment was rendered thereon in favor of appellee.

Cincinnati, etc., R. R. Co. v. Cregor, Administratrix.

The errors assigned, and not waived, call in question the action of the court, in overruling appellant's demurrer to the second and third paragraphs of complaint, and in overruling the motion for a new trial.

It is conceded by appellant that the first and fourth paragraphs of complaint are sufficient; and as the facts found in the special verdict are applicable to, and within, the issues joined on these paragraphs, the error, if any, in overruling the demurrer to the second and third paragraphs, was harmless.

It is assigned as one of the causes for a new trial, that the court erred in giving instructions three and four to the jury. To render this specification available as a cause for a new trial, both of said instructions must be incorrect. *Lawrence v. VanBuskirk*, 140 Ind. 481, 482, and cases cited; *Saunders, Treas., v. Montgomery*, 143 Ind. 185, and cases cited.

In instruction four, after admonishing the jury that they were the sole judges of the facts and the credibility of the witnesses, and stating their duty in reconciling the evidence if there was a conflict, and what they had a right to consider in determining the credibility of a witness and the weight of his evidence, the court said, "And in this inquiry you can call to your aid that knowledge of men and their actions, which in your experience you have acquired by mingling with men." Appellant insists that the part of the instruction set out was erroneous, for the reason that "the jury is bound by what takes place at the trial, and not on any outside information or knowledge they may have acquired."

Jurors are not authorized to consider any evidence except such as is given at the trial, but they have the right to test its truth and weight by their general knowledge derived from experience and observation in their relations with others.

Cincinnati, etc., R. R. Co. v. Cregor, Administratrix,

An instruction substantially the same as the one in controversy was approved by this court in *Jenney Electric Co. v. Branham*, 145 Ind. 314, at p. 322. The court in that case said: "The school of experience which men attend, in their varied relations among men, imparts a keenness of mental vision which enables them the more readily to see the motives and to judge of the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, if possible, be laid aside in passing upon the inducements which may surround a witness, to speak falsely. It is this education which, to a great extent, enables a juror to discover in the faltering manner or the downcast eye whether the statement of the witness is made in modesty or in the guilt of falsehood. The value of experience is not to be given up when the man becomes a juror and is required to apply the tests of credit to the heart and mind of the witness; but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon."

It is clear that the court did not err in giving the fourth instruction. As one of said instructions was good, the motion for a new trial for this cause must fail. *Lawrence v. VanBuskirk*, *supra*. We need not, therefore, determine as to the correctness of instruction three.

The jury answered interrogatories 12 and 13, "Evidence don't show." Before they were discharged, appellant filed its motion to require the jury to answer said interrogatories "affirmatively or negatively," which motion the court overruled. Appellant has not called our attention to any evidence upon which the jury could have answered said interrogatories "affirmatively or negatively," and we cannot, from the answers to the other interrogatories, say

Cincinnati, etc., R. R. Co. v. Cregor, Administratrix.

that there was any such evidence. The court did not err, therefore, in overruling said motion.

On the trial, appellee, who is the widow of Theodore Cregor deceased, was called to testify as a witness; but appellant objected to her testifying concerning matters which occurred prior to her husband's death, and the court overruled the objection. This ruling of the court is assigned as a cause for a new trial. Section 504, Burns' R. S. 1894 (496, Horner's R. S. 1897), provides that "all persons, whether parties to or interested in the suit, shall be competent witnesses in a civil action or proceeding, except as herein otherwise provided." It is evident, therefore, that appellee was a competent witness, unless rendered incompetent by sections 506, 507, Burns' R. S. 1894 (498, 499, Horner's R. S. 1897). Said section 506 (498), *supra*, provides that "in suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, *whose interest is adverse* to such estate, shall not be a competent witness as to such matters *against the estate*." While appellee was a party to the issue and record, her interest was not adverse to the estate; and she did not testify against the estate, but in favor of it. Said section did not, therefore, render her incompetent. Section 507 (499), *supra*, provides that "In all suits by or against heirs or devisees, founded upon a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior

Newton et al. v. Roper et al.

to the death of the ancestor." This section only applies to the cases therein specified. *Cross v. Herr*, 96 Ind. 96; *Lamb v. Lamb*, 105 Ind. 456. This action is not "founded upon contract" nor upon a "demand against the ancestor," but lies in tort, and appellee is, therefore, not rendered incompetent. It follows that the court did not err in overruling appellant's objection to the competency of appellee to testify as a witness to matters which occurred during the lifetime of the deceased. *Bischof v. Mikels*, 147 Ind. 115, 118; *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442, 456. Appellant also assigned as causes for a new trial, that the court erred in overruling appellant's motion for a judgment in its favor on the special verdict, and that the court erred in sustaining appellee's motion for a judgment in her favor on the special verdict. Overruling or sustaining motions for a judgment on a special verdict is not a cause for a new trial. The correctness of the rulings on such motions can only be presented by assigning such ruling as error in this court. *Horn v. Eberhart*, 17 Ind. 118; *Byram v. Galbraith*, 75 Ind. 134; *Northwestern, etc., Ins. Co. v. Blankenship*, 94 Ind. 535, 548; *Louisville, etc., R. W. Co. v. Green*, 120 Ind. 367, 372, 373; Elliott's App. Proc., sections 343, 350, 846, 847. No question is presented, therefore, by said specifications in the motion for a new trial. Finding no available error in the record, the judgment is affirmed.

NEWTON ET AL. v. ROPER ET AL.

[No. 18,249. Filed June 8, 1898.]

TAXATION.—*Tax Sales.*—*Notice.*—*Private Sale.*—A notice to sell lands for taxes at public sale constitutes a sufficient notice to sell same at private sale under sections 247, 248, 249, of the tax law of 1872 (R. S. 1876, p. 127), and such provision is not in conflict with the federal

Newton *et al.* v. Roper *et al.*

constitution in that it deprives the owner of his property "without due process of law."

From the Starke Circuit Court. *Affirmed.*

Albert I. Gould, for appellants.

Burson & Burson and *Geo. W. Breeman*, for appellees.

HACKNEY, C. J.—The appellants, the heirs at law of Joab R. Newton, deceased, instituted this suit to quiet the title to eighty acres of land in Starke county, as against the appellees, who were alleged to be purchasers and to claim title under one Mary E. Kratli, whose only title depended upon a private sale to her by the auditor of said county for delinquent taxes, pursuant to sections 247, 248 and 249 of the tax law of 1872, 1 Davis' R. S. 1876, p. 127, and upon a decree quieting title in her name, against said Joab R. Newton; said sale and said decree being alleged to have been invalid.

The allegations of the complaint conceded notice of the offer of said lands at public sale for the payment of said taxes, but relied upon the absence of notice as to any offer of sale in private. The statute under which the sale was made did not require notice of any such private sale. But it was provided that delinquent lands offered at public sale, and not sold, should "be considered forfeited to the State, to be disposed of as" otherwise provided. Section 235, Acts 1872, p. 115. By section 247, *supra*, it was provided that "Any forfeited or unsold tax land may be purchased at private sale, upon application therefor to the proper county auditor, and upon paying to the county treasurer, on the certificate of the county auditor, the amount for which the same was or should have been first offered, with interest upon said amount at ten per cent. per annum, to be computed from the date at which said

Newton *et al.* v. Roper *et al.*

land was or should have been so offered to the time of making such application and payment." Section 248, *supra*, provided that "Upon application and payment being made as above provided the auditor shall execute to such purchaser a certificate conveying the same interest in and to said lands as would be acquired by virtue of an original public sale, as herein provided." Section 249, *supra*, provided that "All provisions of laws relative to the execution of deeds for lands sold at public sale shall be applicable to lands sold at private sale pursuant to the provisions of this act: *Provided*, That no deed shall be made until after the expiration of two years from the time when such land was or should have been offered at public sale." The objection to the sale is, not that it was not according to the law as quoted, but that the law, in providing a sale without notice to the owner, was void, as in violation of the federal constitution in depriving the owner of his property "without due process of law."

While notice is essential to the due process of law, it is not essential to the validity of every step in a proceeding, judicial or *quasi* judicial, that special notice be given as each step is to be taken. The assessment and enforcement of taxes must be by methods necessarily summary, and without the detail of judicial tribunals. With reference to the assessment of property for taxation, it has been held that there is due process of law when the law has prescribed the time, the place, and the tribunal when, where, and by which assessments are to be made. *Cleveland, etc., R. W. Co. v. Backus*, 133 Ind. 513, and authorities there cited. The law under which the sale in question was made required and obtained a notice to the property owner that his taxes were delinquent, and that a sale would be made to meet the delinquency. It is true that

Newton et al. v. Roper et al.

the notice required to be published was that a public sale would be made, but the plainly written law further provided that a failure to sell at the advertised public sale should forfeit the property to the State, when it would be subject to private sale. The notice of the public offer constructively brought the property owner to the sale, and charged him with notice of his delinquency, of the failure to sell, of the forfeiture to the State, and of the consequences attending upon these facts, as such consequences were prescribed by the written law. The notice, if not more than the constitutional provision requires, was sufficient to advise him that his delinquency was subject to the summary remedies of the law.

While we do not regard the provision of forfeiture, nor its validity, which is not denied, as essential to the decision of the question before us, yet it may be seriously doubted if that provision did not remove the property so far from the reach of the delinquent as to render notice to him unnecessary, and of no importance, and to leave him with but a right of redemption. Just why one, whose property has been forfeited to the State for delinquency in taxes, and for failure to observe notice of delinquency and pending forfeiture, should be entitled to notice of the State's purpose to dispose of it, we do not observe, and counsel has not attempted to advise us. We conclude that the original notice was due process of law; that the provisions of the statute as to private sales were to be noticed by the property owner, and were due process of law; and that the forfeiture following the offer at public sale rendered further notice to the owner unnecessary.

The contention that the legal proceeding by Mary E. Kratli was void is upon the theory that a decree pursuant to a published nonresident notice to adverse parties, where such parties are residents of the State,

Zumpfe v. Kelley et al.

is void. Since we hold the sale valid, the decree and its validity are immaterial questions, and are not passed upon. The lower court did not err in sustaining the demurrers to the complaint, and the judgment is affirmed.

ZUMPFEE v. KELLEY ET AL.

[No. 18,495. Filed June 9, 1898.]

PLEADING.—Cross-Complaint.—Foreclosure of Chattel Mortgage.—

A cross-complaint, in an action to foreclose a chattel mortgage, claiming the property under a prior mortgage, which does not allege that the property described in the cross-complaint is the same as that described in plaintiff's mortgage, is insufficient.

From the Wayne Circuit Court. *Reversed.*

Chas. E. Averill, for appellant.

Samuel C. Whitesell, for appellees.

HOWARD, J.—This was an action by appellant for the collection of the amount due on certain promissory notes given by the appellee Michael Kelly, and to foreclose a chattel mortgage given by him to secure said notes.

To appellant's complaint, the appellee Jung Brewing Company filed several paragraphs of answer and cross-complaint. The fourth of those paragraphs was in the nature of a cross-complaint, and to this the court overruled a demurrer. In this paragraph the appellee brewing company set up a chattel mortgage given by the appellee John Kelly to the appellee Caldwell upon certain property therein described. It is alleged that this property was afterwards transferred by John Kelly to Michael Kelly, subject to said mortgage, that subsequently Caldwell assigned said mortgage to the brewing company, and that Michael Kelly, being unable to comply with the terms of the mortgage, transferred and delivered the mortgaged

Zumpfe v. Kelley et al.

property to the company. The prayer is that the title of the brewing company to the property described in this mortgage be quieted. The court found for the appellant on his promissory notes, and for the brewing company on the mortgage set up in its paragraph of cross-complaint.

We think it was error to overrule the demurrer to the paragraph of cross-complaint. It nowhere appears in this pleading that the property there described is the same as that described in appellant's mortgage. Indeed, it does appear that the property covered by the company's mortgage is located at No. 35 North Eighth street, in the city of Richmond, while that covered by the appellant's mortgage is located at No. 39 North Eighth street, in said city. In the absence of any allegation in the paragraph of cross-complaint to show that the property there described is the same as that mentioned in appellant's complaint, no reason appears why the demurrer should not have been sustained, or even why the paragraph should not have been stricken out on motion. The paragraph of so-called cross-complaint bore no relation whatever to the complaint, and, even if all its allegations were true, it could not constitute any answer or counterclaim to appellant's cause of action.

A like infirmity is shown in appellee's evidence, and it does not there appear that the property covered by the mortgage set up in the cross-complaint is the same as that set up in the complaint. Indeed, the question being directly asked of counsel for the company, while he was on the witness stand, whether the property covered by the company's mortgage was the same as that covered by appellant's mortgage, he replied: "I don't know, I can't tell you." It may be that the property is the same, but the record does not show it. In truth, the record exhibits a state of con-

Kennedy v. Kennedy et al.

fusion that can be remedied only by returning the case to the trial court. The judgment is reversed, with instructions to sustain the demurrer to paragraph marked four of answer and cross-complaint, and with leave to amend all pleadings or to file new pleadings.

KENNEDY v. KENNEDY ET AL.

[No. 18,528. Filed June 9, 1898.]

HUSBAND AND WIFE.—*Antenuptial Contract*.—*Equitable Jointure*.—

A contract entered into by a husband and wife, prior to their marriage, in relation to their property rights, is not a settlement or jointure within the meaning of section 2661, Burns' R. S. 1894, which provides that before such settlement or jointure shall constitute a bar to the right or claim of the wife in the lands of her husband, she must give her assent in writing to receive the same in lieu of all right or claim in the lands of her husband. pp. 641, 642.

SAME.—*Antenuptial Contract*.—An adult wife may bar her legal rights in her husband's estate by an agreement entered into before marriage to accept other reasonable provisions in lieu thereof. pp. 642, 643.

SAME.—*Marriage Contract*.—*Construction*.—The court in construing a marriage contract will endeavor so to interpret it as to carry out the true intent of the contracting parties, without regard to the strict technical meaning of words therein employed. p. 643.

SAME.—*Marriage Contract*.—A man seventy-one years old, the father of five children by a former marriage, and the owner of real estate of the value of \$15,000.00, of an annual rental value of \$600.00, entered into a marriage contract with a woman forty-three years of age, whereby it was agreed that at the death of the husband the wife should have one-third of all the property acquired by them during such marriage, and an annuity of \$200.00 during her life, or so long as she should remain a widow, the payment thereof to be secured by his heirs before taking possession of his estate; there were no children by virtue of such marriage. *Held*, that the provision made for the wife in the marriage contract was in lieu of her marital rights, and barred her from claiming or asserting her life interest, and her rights of quarantine in the lands of her deceased husband. pp. 644-648.

From the Rush Circuit Court. *Affirmed*.

John M. Stevens, John A. Titsworth, Douglas Mor-

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Kennedy v. Kennedy et al.

ris, Samuel L. Innis and George W. Morgan, for appellant.

B. L. Smith, Claude Cambern, D. L. Smith, L. D. Guffin and J. E. Watson, for appellees.

JORDAN, J.—This was an action in partition, instituted by the appellant, Sarah M. Kennedy, the widow of Archibald M. Kennedy, against the appellees, who are his children, and also legatees under his will. The complaint is in two paragraphs, but as appellant, through her counsel, has virtually waived all questions in respect to her alleged rights under the first paragraph, we give it no consideration. By the second paragraph of her complaint, appellee seeks to have assigned to her, for life, one-third of the real estate of which her husband died seized, and also to be awarded her quarantine rights, under the statute, in respect to the occupancy of the dwelling house of the deceased, and real estate adjoining thereto. This paragraph recites the provisions of an antenuptial contract executed by appellant and her deceased husband, and a copy thereof is filed as an exhibit. Appellees answered the complaint in two paragraphs, the first being a general denial. The second set out, and relied on as defense in bar to the action, the antenuptial contract mentioned in the complaint. Appellant unsuccessfully demurred to this second paragraph of the answer, whereupon appellees withdrew their general denial; and she electing to stand by her demurrer to the answer, and refusing to further plead, judgment was rendered in favor of the appellees. The only question involved in the assignment of error is the construction of the marriage contract set up in the answer.

The facts averred in the answer may be thus summarized: On and prior to May 24, 1889, Archibald M. Kennedy, appellant's deceased husband, was a wid-

Kennedy v. Kennedy et al.

ower seventy-one years of age, and was the father, by a former marriage, of five adult children, the appellees in this action. He was the owner in fee simple at that time, and also at the date of his death, of the real estate of which appellant seeks partition, consisting of 240 acres, of the value of \$15,000, and of an annual rental value of \$600, and was also the owner, at the date of the contract, of a small amount of personal property. The appellant, at that date, was a widow forty-three years old, without children, and owned in her own right, property, real and personal, of the value of \$1,000. On said 21st day of May, she and the said Archibald M. Kennedy, in contemplation of marriage, entered into and executed the contract in controversy; and on the next day they were duly married to each other, and became husband and wife, and lived together as such on the land in dispute until January 3, 1897, on which day Archibald M. Kennedy died, at Rush county, Indiana, leaving an estate, real and personal, of the value of \$15,000, and leaving appellant surviving him as his widow, no children having been born to them as fruits of their marriage. On May 2, 1893, deceased executed a will in which he provided that the antenuptial contract, existing between him and his wife, should be faithfully carried out in every particular, and directed that his personal estate be sold and the proceeds be divided among his children, and that his wife should have all the property that she owned at the time of the marriage, and also one-third of the accumulations of their joint property, as in the contract provided, and in addition, he bequeathed to her a large portrait of herself and her said husband; and he further directed, in his will, that his funeral expenses be paid out of his said property, and that no part of said expenses be charged to the joint property accumulated since the marriage.

Kennedy v. Kennedy et al.

The will further provided that after the provisions of the marriage contract had been complied with, and after a good and sufficient bond had been filed with the court for the faithful payment of the annuity mentioned in the antenuptial contract, which annuity, the will directed, should be paid semiannually, after the filing of such bond, the testator directed that appellees, his children, naming them, should be entitled to take charge of the property and divide it equally among them. This will was duly probated the 12th day of January, 1897, in the Rush Circuit Court, and on the same day, appellees executed to appellant a bond in the sum of five thousand dollars, conditioned for the payment semiannually to her of the annuity as provided in the marriage contract, which bond was, on the same day, accepted in writing by appellant as being sufficient for carrying out the provisions of said contract and the provisions of any will made by her deceased husband. On July 10, 1897, appellant filed in the office of the clerk of the Rush Circuit Court her election rejecting the provisions of her husband's will, and electing to take under the law.

The following is a copy of the contract in controversy, together with a copy of the estimate of the value of the personal property held by the husband on January 1, 1890: "This agreement, between Archibald M. Kennedy, of Rush county, Indiana, and Sarah Hall (formerly English), of Greensburg, Decatur county, Indiana, witnesseth, that the said parties have mutually promised to intermarry. Now, for the purpose of arranging all questions of property, and in consideration of said promise to marry, said parties agree as follows: All the property of both parties, now owned or hereafter acquired by them, or either of them, to be the common property of both parties, the rents and profits of which are to be used for their

Kennedy v. Kennedy et al.

support. And at the death of said A. M. Kennedy all the property now owned by said Sarah and one-third of all the property acquired by them, or either of them, in excess of living expenses, taxes and repairs during their marriage (the said A. M. Kennedy to make a schedule or estimate of his personal property owned by him on the first day of January, 1890, and attach the same to this agreement), and all property acquired after that time, after paying expenses, etc., as above stated, is to belong one-third thereof to said Sarah, which together with the property now owned by her, is to be her own separate property. It is also agreed that, should said Sarah survive said A. M. Kennedy, then she is to have an annuity of two hundred dollars during her life, or so long as she remains a widow, which annuity is to be secured to said Sarah by all said Kennedy's legal heirs executing a bond with good and sufficient security conditioned for the prompt payment to her of the said annuity, before they shall be entitled to take possession of his estate. It is further agreed that if the said Sarah does not remain a good, true, faithful and loving wife until the death of said A. M. Kennedy, or if she separates from him, then in that case she is not to have anything but the property now owned by her; but no one is to be permitted to bring complaint of the want of love, care and fidelity to said Kennedy but he himself, unless brought during his life time. Witness our names this 21st day of May, 1889. Archibald M. Kennedy, Sarah Hall." "According to the above agreement I have estimated the value of my personal property on the 1st day of January, 1890, to be one horse and buggy and harness, to be worth one hundred and fifty dollars, and hogs, corn and hay to the value of one hundred dollars. This constitutes all the personal property owned by me over and above

Kennedy v. Kennedy *et al.*

what will pay my debts, besides household furniture and the two thousand dollar note on my son Charlie, not taken into account. All increase above that, my wife, Sarah, will be entitled to the one-third. A. M. Kennedy."

The contention of counsel for appellant is that in accord with the proper construction of this contract, it must be held that it was not intended thereby to intercept the rights of the wife, which the law, at the death of her husband, would award her in his estate as his surviving widow. They insist that it was the intention of the parties that the appellant should have the annuity provided in the contract, after the death of the husband, in addition to the provisions made for her by law. Counsel for appellee, however, contend that appellant's rights and interest, in respect to the estate of her late husband, must be measured solely by the contract, and that she is thereby barred from claiming or asserting her life interest and her rights of quarantine in the lands in controversy. Appellant's counsel insist that the one-third life interest in the lands of her deceased husband, and also her right to the widow's quarantine, are rights which appellant is awarded under sections 2644, 2653, Burns' R. S. 1894, and consequently she can only be barred or deprived of such rights thereunder in the manner provided by the statute of descents for creating a jointure for an intended wife. Sections 2661, 2663, Burns' R. S. 1894 (2500, 2502, R. S. 1881). Therefore they say that, inasmuch as the contract in question fails to respond to the requirements of section 2661, *supra*, in not expressly stipulating that appellant assented to receive or accept the provisions made for her "*in lieu of all right or claim*" in the lands of her husband, she is entitled to her legal rights in respect to such lands.

Kennedy v. Kennedy et al.

The case at bar, however, is not one of a settlement or jointure under the statute, but is simply an antenuptial contract, and is in the nature of what is denominated by the authorities as an "Equitable jointure." In 2, *Scribner on Dower*, page 409, section 35, in treating upon the subject of legal and equitable jointures, the author says, "With respect to the legal requisite, that the estate limited in jointure be such an estate of freehold as should continue during the wife's life, no such circumstance will be necessary in equity in order to make the jointure an absolute bar to dower, if the intended wife be of age and a party to the deed; because, as she is able to settle and dispose of all her rights, she is competent to extinguish her title to dower upon any terms to which she may think proper to agree." Continuing on page 413, section 42, it is said, "The cases are not entirely agreed upon the question as to whether an antenuptial contract which merely secures to the wife her separate property, and makes no provision for her out of her husband's estate, is a good equitable jointure; but in a majority of the cases it is held, that if it be a part of such agreement that the wife shall relinquish her dower, it will be good in equity."

The right of an adult intended husband and wife in contemplation of marriage, to intercept a statutory line of descent, or the rights conferred by law, and substitute by contract, or agreement, a rule of inheritance of their own creation, by which their respective rights in the property of each other may be measured or determined, is a well settled principle. *Bishop on Married Women*, section 427; *McNutt v. McNutt*, 116 Ind. 545, 2 L. R. A. 372. In fact, no principle seems to be more firmly settled at the present time than that an adult woman, before her marriage, may bar her legal rights in her husband's estate by her agreement

Kennedy v. Kennedy *et al.*

to accept any other provisions in lieu thereof, and such an agreement will be upheld and enforced by the courts in the absence of fraud or imposition upon her, and where it may be said, under the particular circumstances, that it is not unconscionable. *McNutt v. McNutt*, *supra*, and authorities there cited; *Shaffer v. Matthews*, 77 Ind. 83; *Andrews v. Andrews*, 8 Conn. 79; *Barth v. Lines*, 118 Ill. 374, 7 N. E. 679. In *McNutt v. McNutt*, *supra*, on page 550 of the opinion, Elliott, J., speaking as the organ of this court, said: "The truth is, it is exceedingly difficult to imagine why, in any case where there is no fraud, courts should displace the judgment of contracting parties and substitute their own. No person in the world can so well and so justly judge as the contracting parties themselves, and it is only in the strongest and clearest cases that courts should disregard their judgment, and never where there is neither positive wrong nor a fraud."

Tested by these well settled principles, we are of the opinion that appellant and her prospective husband, at the time they executed the contract in controversy, intended that her rights in his estate, at his death, should be measured solely by the provisions therein made for her. It is true that the instrument is awkwardly drafted, and inaptly worded, but a court, in construing a marriage contract, will endeavor to so interpret it as to carry out the true intent of the contracting parties, without regard to the strict technical meaning of words therein employed. 14 Am. and Eng. Ency. of Law, 550.

The rule by which we must be controlled in the interpretation of this contract is that which is applicable to any other contract: First, it must be considered, not in fragments, but as an entirety, and the intention of the parties ascertained through the words

Kennedy v. Kennedy et al.

they have used. To ascertain their intention, regard should be had to the character of the instrument, the condition of the parties, and the object which they had in view. *City of Vincennes v. Citizens, etc., Co.*, 132 Ind. 114, 16 L. R. A. 485; *Davenport v. Gwilliams*, 133 Ind. 142, 22 L. R. A. 244; 5 Lawson's Rights and Remedies, section 2316; *Ragsdale v. Barnett*, 10 Ind. App. 478.

The circumstances or conditions of the parties to this contract, at the time of its execution, appear from the averments of the answer to have been substantially as follows: Mr. Kennedy, the intended husband, was a widower seventy-one years of age; the father by a previous marriage of five adult children; and was the owner at the time of 240 acres of land, being that now in dispute, of the value of \$15,000, and an annual rental value of \$600, and was also the owner of some personal property. There is no contention that appellant, at the time she entered into the contract, was not fully apprized of the amount and value of the property owned by her husband. She, it appears, was a widow forty-three years old, with no children, being the junior of her future husband by twenty-eight years, and, at the time, was the owner of real and personal property of the value of \$1,000.00. At the date of the contract, the act of March 11, 1889, which vests a childless second wife, on the death of her husband, where the latter leaves surviving children by a previous marriage, with a life estate in one-third of his lands, was in force. From the fact that at the date of this agreement, the husband had passed the age of "three score years and ten," the usual period allotted to man, each of the parties, under the circumstances, may have reasonably supposed that the wife would survive her intended husband, and, considering their respective

Kennedy v. Kennedy *et al.*

ages, they might also have reasonably assumed that no child or children would be born to them as fruits of the marriage. Under such circumstances, and in view of the fact that children of the husband, by a former marriage, would probably survive him, appellant is presumed to have known that, under the law, so far as her interest in his lands was concerned, she would be confined to a life estate in one-third thereof. Ordinarily, the presumption, at least, would be that each of the parties was aware of the provisions made by law, and that they contracted with the full knowledge of such legal provisions. The written agreement states that the parties "have mutually promised to intermarry," and then follows a stipulation in these words: "Now, for the purpose of arranging all questions of property, and in consideration of said promise to marry, said parties agree, etc." No question of property rights would seem to have been contemplated other than those which would arise under the law by reason of the parties becoming husband and wife; and to provide for and adjust such rights by their own agreement, instead of leaving them to be controlled by the law, would certainly, under the circumstances, appear to have been the object in view. In settling these questions, and providing, by their own mutual agreement, based on the consideration of marriage, the highest recognized by law, the means by which they should be measured and determined, the parties in effect provided: First, that the property owned by each, at the time of the execution of the contract, and also that thereafter acquired, was to be considered or used as a common fund for their support; or, in other words, the rents and profits arising therefrom during the marriage, were to be subjected to or applied to the support of both. Under the law, in the absence of this agreement, the husband would

Kennedy v. Kennedy et al.

not have been authorized to apply the rents and profits accruing from the separate property of the wife, during the marriage, to their support. Second, at the death of the husband, all of the property held by appellant at the date of the agreement, together with one-third of all that might be acquired by them, or either of them, after deducting living expenses, taxes, etc., was to belong to the wife, as her own separate property. In addition to this, it was provided that she was to be paid an annuity of \$200 during life, or so long as she remained a widow. The payment of this annuity was to be secured by a bond, executed by the heirs of the husband, with good and sufficient security, after which it was in effect stipulated that his heirs would be entitled to take possession of his estate.

Considering the age of the husband, and the fact that he had five living children, who, so far as we are apprised, were deserving of their father's bounty, it would not be reasonable to assume that appellant's future husband, at the very threshold of their marriage, intended by the terms of the instrument in question to make provisions for her in addition to the portion of his estate which the law would award her, in the event she survived him as his widow. If the interpretation of the contract, for which appellant's counsel contend, be accepted as the correct one, then the part of the husband's estate, to which appellees, as his children and heirs, would be entitled, in the absence of the contract, would be diminished by subjecting such part of the estate so received by them, to the payment of the annuity; and thereby, appellant's interest in the estate would be enlarged, at least, to the amount of the annuity, over and above that awarded to her by the law.

It is evident, we think, that such a result was not

Kennedy v. Kennedy et al.

intended by the parties to this contract, and there is nothing in its terms or stipulations that will justify such a construction. Certainly, when the conditions and circumstances of the contracting parties are taken into consideration, there can be no doubt but what the husband intended, and the appellant on her part assented, that the provisions so made for her, by the contract in question, were to be in lieu of, or as a substitute, at his death, for her legal rights or interest in his estate. Considering the entire scope of the contract, it is manifestly repugnant to the claim which appellant asserts, that she is entitled to the benefits of the provisions made for her therein, and also to her rights under the statutes.

The instrument in question being an antenuptial contract, she can therefore exercise no choice by election but in the exercise of her rights, she is confined alone to its provisions. The contention of counsel, that to uphold this agreement would be unconscionable, cannot, in reason, under the circumstances, be sustained. It cannot be asserted that she agreed to receive a mere pittance of her husband's estate. In addition to her holding the property, which she had at the time of her marriage, as her own, together with one-third of that acquired by her and her husband, she was to be paid an annuity of \$200 for life, or during her widowhood; and, as the annual rental value of the lands in controversy is \$600, it may be said that the payment to her of this annuity is virtually equivalent to the use and enjoyment of one-third of her husband's lands, as a tenant for life.

This case is quite unlike that of *Achilles v. Achilles*, 151 Ill. 136, 37 N. E. 693, upon which counsel for appellant rely. In that case it did not appear that the wife had entered into the marriage contract with a full knowledge of the extent of the husband's property.

O'Mara, Administratrix, v. The Wabash Railroad Company.

The latter owned personal property at the time of the execution of the contract, of the value of \$10,000, and real estate worth \$12,500. In the absence of such a contract, the wife, at his death, would have been entitled, under the law, as the court states, to all of his personal property, and one-half of his real estate, absolutely, and dower in the remainder of such realty. It appears that she agreed, in lieu of her legal rights in his estate, to accept an annuity of \$200 during widowhood, and in addition to this the right to use a half of a house and lot. It was held by the court in that case that the provisions made for her under the contract therein involved were so disproportionate to the estate of the husband that the contract could not be upheld, in the absence of proof that it was fairly entered into on the part of the wife, with the full knowledge of the extent of the property owned by her husband. An examination of the facts of that case will readily distinguish it from the one at bar. The court did not err in holding the answer sufficient as a defense to appellant's action, and the judgment is therefore affirmed.

O'MARA, ADMINISTRATRIX, v. THE WABASH RAILROAD COMPANY.

[No. 18,407. Filed June 10, 1896.]

APPEAL AND ERROR.—Notice.—Vacation Appeal.—A notice served on the attorney for appellee in a vacation appeal is not sufficient, under section 652, Burns' R. S. 1894, to give the Supreme Court jurisdiction thereof. *p. 649.*

STATUTES.—Amendment.—Vacation Appeals.—Notice.—The act of 1897 (Acts 1897, p. 277), purporting to amend section 652, Burns' R. S. 1894 (640, R. S. 1881), providing that service of notice upon appellee's attorney of record shall be sufficient in vacation appeals is invalid for the reason that it does not express the subject thereof in its title by reference to the act or the title of the act to be amended. *649, 650.*

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O'Mara, Administratrix, v. The Wabash Railroad Company.

APPEAL AND ERROR.—Notice.—Dismissal for Failure to Give Sufficient Notice.—An appeal will be dismissed under rule thirty-six of this court on account of ineffectual notice, where no diligence is shown by appellant to secure proper service after a motion to dismiss for such cause has been filed. *pp.* 650, 651.

From the Tippecanoe Circuit Court. *Appeal dismissed.*

Lairy & Mahoney and *McConnell & Jenkins*, for appellant.

Edwin P. Hammond, *Charles B. Stuart* and *William V. Stuart*, for appellee.

HACKNEY, C. J.—This was a vacation appeal. The transcript was filed, and a notice was issued by the clerk of this court and served upon an attorney for the appellee. No other notice was issued, and no other service was had or sought. Under section 652, Burns' R. S. 1894 (640, R. S. 1881), this notice would not be sufficient to give this court jurisdiction of the appellee. *Hazelton v. DePriest*, 143 Ind. 368; *Tate v. Hamlin*, 149 Ind. 94.

The appellee, in support of its motion to dismiss the appeal, insists that the act of 1897, Acts 1897, p. 277, purporting to amend section 640 above referred to, and providing that service of notice upon the attorneys of record shall be sufficient, is invalid, and subjects the service to the test of section 640, *supra*.

Appellant's learned counsel do not seek to uphold the service under section 640, and make no defense of the act of 1897. That act, by its enacting clause, purports to amend "section 640 of the Revised Statutes of 1881 being an act concerning appeals to the Supreme Court of Indiana." Its title is "An act entitled an act concerning appeals to the Supreme and Appellate Courts of Indiana, and providing what notice shall be necessary, amending section 640 of the Revised Statutes of 1881, being an act concerning civil

O'Mara, Administratrix, v. The Wabash Railroad Company.

procedure and declaring an emergency." The reference, in the title, to section 640 of the Revised Statutes, is not sufficient. *Boring v. State*, 141 Ind. 640; *Feibleman v. State, ex rel.*, 98 Ind. 516. Nor does the title make any reference to the title of the act from which section 640, *supra*, originated. It simply refers to said section as "being an act concerning civil procedure," while said section was never "An act" but was a single section of an act entitled "An act concerning proceedings in civil cases." Acts 1881, p. 240. The title of the act of 1897 seems to have been possibly intended to apply to either an original or an amendatory act, but the enacting clause and section so clearly give the act character as an amendatory act that an intention to enact an original statute is not probable. We see no escape from the conclusion that the act does not express the subject thereof in its title by reference to the act or the title of the act to be amended. It is therefore invalid. *Boring v. State, supra*, and authorities there cited.

It is insisted on behalf of the appellant that, conceding all we have said, the appeal should not be dismissed, but that an order should be made for service of process. Rule thirty-six of this court provides that "Where a cause appealed in vacation has been on the docket ninety days or more, and there is no appearance by the appellee, and no steps have been taken to bring him into court; or where a notice has been issued and proves ineffectual from any cause, and no steps are taken for more than ninety days after the issuance of such ineffectual notice to bring the appellee into court, the clerk shall enter an order dismissing the appeal."

One of the manifest objects of this rule was to require appellants to assume the responsibility of bringing the appellee into court promptly and by the

Evans v. The State.

proper notice. An ineffectual notice, from any cause, requires additional steps to be taken by the appellant, and it will not suffice to say that he caused a proper notice to issue, and if not properly served he may have an indefinite time to procure another notice and service.

Conceding the invalidity of the act under which the service was had, as is done by making no defense of it, some diligence should have been exercised, even if we could avoid the force of said rule. No diligence has been shown, since the filing of appellee's motion to dismiss, to procure other service. The appeal is therefore dismissed.

EVANS v. THE STATE.

[No. 18,512. Filed June 10, 1898.]

LARCENY.—Information.—An information charging one E with the larceny of certain described property, "such property then and there being the personal goods and chattels of one H," sufficiently charges that the property stolen was the property of H. pp. 651, 652.

SAME.—Information.—Idem Sonans.—An information for larceny is not rendered bad by reason of the fact that the affidavit gives the name of the person from whom the property was stolen as "Horrick," and the information as "Horick," the names being *idem sonans*. p. 652.

CRIMINAL LAW.—Second Conviction.—Where a statute imposes a greater punishment upon second or subsequent convictions of an offense, the former conviction must be alleged in the indictment and proved at the trial, or the same can only be punished as a first offense. p. 653.

LARCENY.—Second Conviction.—Verdict.—Where an indictment for petit larceny charges a former conviction for a like offense, and the jury return a verdict of guilty as charged, the defendant is found guilty of petit larceny, but is subject to the punishment prescribed for grand larceny. p. 654.

SAME.—Information.—Verdict.—Harmless Error.—Where an affidavit and information charges larceny, but does not charge a former conviction, a verdict finding the defendant "guilty of grand larceny as charged in the information," will be construed as a convic-

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 Evans v. The State.

tion for petit larceny, and an error of the court instructing the jury as to grand larceny, is harmless. *pp. 654, 655.*

APPEAL.—*General Objections to Judgment.*—*Review.*—Where on the trial of a criminal cause the defendant makes a general objection to the judgment rendered on the verdict, but does not point out any specific objection thereto, or move to modify the same so as to conform to the verdict, the objection will not be considered on appeal. *p. 655.*

From the Kosciusko Circuit Court. *Affirmed.*

Leigh H. Haymond, for appellant.

W. A. Ketcham, Attorney-General, *M. H. Summy* and *Merrill Moores*, for State.

MONKS, J.—Appellant was tried and convicted upon an affidavit and information charging him with the crime of petit larceny. The errors assigned and not waived call in question the action of the court in overruling the motion to quash the information, and in overruling the motion for a new trial.

The first objection urged against the information is that it did not charge that the property alleged to have been stolen was the property of Ambrose L. Horrick, or any other person. The information charges that "one, Charles Evans, did then and there feloniously steal, take and carry away one set of single buggy harness of the value of ten dollars, such property then and there being of the personal goods and chattels of one Ambrose L. Horrick."

It is claimed by the appellant that the word "such" as used, does not mean the same as the word "said," which should have been used to make the information sufficient as to the ownership of the property stolen.

Under our Statutes the rule in criminal pleading is that the words "must be construed, in their usual acceptation, in common language; except words and phrases defined by law, which are to be construed according to their legal meaning." Section 1805, Burns' R. S. 1894 (1736, Horner's R. S. 1897).

Evans v. The State.

In construing the word in a statute, Mr. Justice Story said, "The word 'such' has an appropriate sense, and can be reasonably referred only to the ship or vessel previously spoken of. *United States v. Gooding*, 12 Wheat., p. 477. Defining the same word the Century Dictionary says, "2. The same as previously mentioned or specified, not other or different."

It is evident that the words "such property," used in the information refer only to the "one set of single buggy harness" previously mentioned, and to no other or different property. The information therefore clearly charged that the property stolen was the property of Ambrose L. Horrick.

The next objection to the information is that the name of the person whose property is alleged to have been stolen is given as "Horick," in the affidavit, and as Horrick in the information. The names are *idem sonans*, and the variance in the spelling is therefore immaterial. *Smurr v. State*, 88 Ind. 504; 506, and cases cited; *Siebert v. State*, 95 Ind. 471. The court did not err in overruling the motion to quash.

The verdict returned found the appellant "guilty of grand larceny, as charged in the information."

It is insisted by appellant that as a former conviction of petit larceny was not averred in the affidavit and information, no question concerning grand larceny or the punishment therefor was presented, and therefore the court erred in giving any instruction as to the right of the jury to find the appellant guilty of grand larceny, and that for the same reason the verdict was contrary to law.

The doctrine that when a statute imposes a greater punishment upon second and subsequent convictions of an offense, that the former conviction must be alleged in the indictment and proved at the trial, or the same can only be punished as a first offense, is sus-

Evans v. The State.

tained by the great weight of the authorities. Wharton's Crim. Pl. and Prac. (9th ed.), section 935; Bishop's Directions and Forms, section 91; 1 Bishop's Crim. Proc., section 101; Bishop's Stat. Crimes, sections 240, 981, 1044; 1 Bishop's Crim. Law, sections 959-964; Clark's Crim. Proc., pp. 203, 204; *Maguire v. State*, 47 Md. 485; *Plumbly v. Commonwealth*, 2 Metc. (Mass.) 413; *Tuttle v. Commonwealth*, 2 Gray 506; *Commonwealth v. Holley*, 3 Gray 458; *Garvey v. Commonwealth*, 8 Gray 382; *Commonwealth v. Miller*, 8 Gray 484; *Commonwealth v. Harrington*, 130 Mass. 35; *Rauch v. Commonwealth*, 78 Pa. St. 490; *Rand v. Commonwealth*, 9 Grat. (Va.) 738; *State v. Adams*, 64 N. H. 440, 13 Atl. 785; *State v. Gorham*, 65 Me. 270.

It is provided in section 2007, Burns' R. S. 1894, (1934, Horner's R. S. 1897), that "upon a second conviction of petit larceny, the person convicted shall suffer the punishment prescribed for those convicted for grand larceny." It is evident that when an indictment for petit larceny charges a former conviction for a like offense, and the jury return a verdict of guilty as charged, the defendant is not found guilty of grand larceny but of petit larceny, and that he had been convicted of a like offense as charged. In such case the defendant is not guilty of grand larceny, he is only subjected thereby to the punishment prescribed by law for grand larceny, which under act of 1897 it is the duty of the court to adjudge. Acts 1897, p. 73, section 8, p. 219, section 1.

The verdict in this case found appellant "guilty of grand larceny as charged in the information," but the verdict must be construed in connection with the information, as he was only found guilty of the offense charged therein which was petit larceny. The verdict, therefore, only found the appellant guilty of petit larceny, and the error of the court, if any, committed

Evans v. The State.

in instructing the jury as to their being authorized to find appellant guilty of grand larceny, was harmless. As the verdict only found the defendant guilty of petit larceny, which was charged in the information, and as the evidence is not in the record, the same cannot be said to be contrary to law.

The error, if any, committed by the court, was in rendering judgment on the verdict under the reformatory act of 1897, fixing the penalty for grand instead of petit larceny. Appellant made a general objection to the judgment, but did not point out any specific objection thereto, or move to modify the same so as to conform to the verdict. It is settled law in this State that the form or substance of a judgment cannot be first questioned in this court, but the question must be first presented to the court below by a motion to modify, which must specify wherein it should be corrected and modified, and the objection must particularly point out the defect or mistake complained of, and ask that the same be corrected. If the court rules against the party asking such correction, such ruling of the court below must be assigned as error in this court. Unless this is done no objection can be made available for reversal here, however erroneous in form or substance such judgment may appear to be. *Chicago, etc., R. W. Co. v. Eggers*, 147 Ind. 299, 302, 303, and cases cited; *Stout v. Curry*, 110 Ind. 514; *Hormann v. Harmetz*, 128 Ind. 353, 358, and cases cited; *Terry v. Shively*, 93 Ind. 413, 417; *Clayton, Admr., v. Blough*, 93 Ind. 85, 95; *McCormick v. Spencer*, 53 Ind. 550; *Douglass v. State*, 72 Ind. 385; *Bayless v. Glenn*, 72 Ind. 5; *Martin v. Martin*, 74 Ind. 207, 209; *Rardin v. Walpole*, 38 Ind. 146; *Walter v. Walter*, 117 Ind. 247; *Sanxay v. Hunger*, 42 Ind. 44, 51; *Kennedy v. Irwin*, 25 Ind. 66; *Baker v. Horsey*, 21 Ind. 246; *Forgey v. First Nat'l Bank*, 66 Ind. 123, 128; *McNutt*

The Salem-Bedford Stone Company v. O'Brien.

v. *McNutt*, 116 Ind. 545, 565, 2 L. R. A. 372; *Jenkins v. Rice*, 84 Ind. 342; *Carrothers v. Carrothers*, 107 Ind. 530, 534, and cases cited; *Wood v. State, ex rel.*, 130 Ind. 364, 366; *Douthit v. Douthit*, 133 Ind. 26, 36; *Stalcup v. Dixon*, 136 Ind. 9, 19; *Indiana Racing Association v. Allen*, 140 Ind. 437; *Jarrell v. Brubaker*, ante, 260; Elliott's App. Proc., sections 344, 345, 346.

Finding no available error in the record, the judgment is affirmed.

THE SALEM-BEDFORD STONE COMPANY v. O'BRIEN.

[No. 17,855. Filed Feb. 24, 1898. Rehearing denied June 10, 1898.]

APPEAL AND ERROR.—*Nunc Pro Tunc Order*.—*Evidence*.—*Presumption*.—Where no appeal was asked or granted at the close of the trial, and a *nunc pro tunc* entry was made at the succeeding term of court correcting such omission, it will be presumed that the evidence adduced was sufficient to justify the action of the court, where neither the motion for the entry nor the evidence upon which the court acted was made part of the record. p. 657.

SPECIAL VERDICT.—*Formal Defects*.—A special verdict will not be set aside on account of mere formal defects, where it does not appear that any objection was made to the verdict when it was received. p. 658.

MASTER AND SERVANT.—*Personal Injuries*.—*Contributory Negligence*.—Where an employe engaged in handling heavy stone by means of a traveler and other machinery on an elevated track, under the direction of a superintendent, and while going to the ground, as required, stepped upon a shaft which revolved by reason of a sudden gust of wind striking the traveler, and his ankle was drawn into the bevel gearing thereof and injured, he was not guilty of such negligence as to bar a recovery for such injury, where it was shown that he was a common laborer and employed as such, and that it was the custom to chock or brace the wheels of the traveler when it was at rest, and that plaintiff had reason to believe that it was chocked at the time, and could not have discovered that it was not chocked without making close inspection thereof. pp. 658-662.

From the Lawrence Circuit Court. *Affirmed*.

E. K. Dye, Elliott & Elliott and W. H. Martin, for appellant.

M. F. Dunn and S. B. Lowe, for appellee.

The Salem-Bedford Stone Company v. O'Brien.

HOWARD, C. J.—The appellee recovered judgment against the appellant in the sum of \$4,750.00, for personal injuries alleged to have been caused by the wheels of a heavy piece of machinery called a “traveler,” said to have been used by appellant in a negligent manner in connection with the business of its stone quarry.

It is contended by counsel for appellee that there is no question before us, for the reason that the record does not show that any appeal was prayed or granted at the close of the trial. At the succeeding term of court, there was an attempt to correct this apparent omission, by the entry of a *nunc pro tunc* order. It must be said that this attempt is not shown to have been a very satisfactory one; but the order made, though crude, was perhaps sufficient for the purpose intended. Moreover, appellee has not caused the motion for this *nunc pro tunc* entry, nor the evidence upon which the court acted, to be brought up by bill of exceptions or otherwise, and we must presume that the evidence adduced was such as to justify the action of the court. *Ellis v. Keller*, 82 Ind. 524.

The first error assigned is, that the court overruled a demurrer to the complaint. On a former trial of the case, judgment was given appellee in the sum of \$3,000.00. This judgment was reversed in the Appellate Court, *Salem-Bedford Stone Co. v. O'Brien*, 12 Ind. App. 217. On that appeal the complaint was held good. The complaint now before us is not substantially different from that on the former appeal, and we are of opinion that there was no error in overruling the demurrer to it.

The verdict was a special one, by answers to interrogatories, under the act of 1895, now repealed. Acts 1895, p. 248. Nearly 220 questions were pre-

The Salem-Bedford Stone Company v. O'Brien.

pared by counsel on both sides. So great a number of interrogatories seems to have been quite unnecessary, and hardly in accordance with the spirit of the act referred to. That statute required the finding, simply, of the facts essential to the decision of the issues involved. It is not to be wondered at that there may be some apparent confusion, or even contradiction, in the multitude of answers to interrogatories in the case at bar. But we do not think the verdict is shown to be so defective that no judgment could be rendered upon it, or, consequently, that a *venire de novo* ought to be awarded.

As to mere formal defects complained of, it does not appear that any objection was made to the verdict when it was received. The court should have had an opportunity to send the jury back to correct any such errors in the verdict. *Chicago, etc., R. R. Co. v. Ostrander*, 116 Ind. 259.

The third and fourth assignments of error, relating to the action of the court in entering judgment upon the verdict, may be considered together. From the answers returned by the jury to the interrogatories submitted to them these facts appear: On July 28, 1892, and previous thereto, the appellant was engaged in the business of moving heavy stone and loading the same on cars by means of travelers and other machinery, under direction of one Pearson, as superintendent, in full charge of the business, and with power to employ and discharge men. On July 4, 1892, appellee was employed by Pearson to work as a common laborer, and "scabble" stone, and continued in appellant's employment until his injury on July 28, 1892. It is found that appellee had no skilled knowledge of travelers, tramways, or other machinery, or the mechanism relating thereto, used in and around the place where he was employed, and that appellant knew that

The Salem-Bedford Stone Company v. O'Brien.

he had no such knowledge or experience; but that appellant and its said superintendent in charge had full knowledge of all these matters, and by inspection could have discovered the exact condition of the machinery before and at the time of the injury to appellee, but that no such inspection was made. From twenty-seven to 100 men were employed in and around appellant's works. Notwithstanding the fact that appellee was employed only as a common laborer and to scabble stone he was often sent up to work on one of the travelers, and on the cab running along the same. The jury find that this was a more hazardous place to work than on the ground. The traveler on which he was injured was about twenty-five feet from the ground, and rested upon trucks that moved along tramways on either side. The traveler extended north and south, and the tramways east and west. Above the traveler was a cab that moved over the traveler, from one side of the tramway to the other. There were two principal ways for reaching the traveler, one by a ladder near the north trucks and the other by a ladder near the south trucks. Appellee on the day of his injury was at work under the cab and above the traveler. The place was difficult of access, by reason of the ladders, tramways, and trusses up and over which it was necessary to go in order to reach it. The jury find that in moving along on the way to or from his place of work it was necessary, on account of the narrowness of the beams on which he stepped, for appellee to give close attention to where he placed his feet and hands in order to avoid slipping or falling to the ground. The distance to appellee's place of work by the north ladder was about forty feet shorter than by the south ladder; and it was usual for those at work near the north end of the traveler to ascend and descend by the north ladder, as appellee did on this occasion. There

The Salem-Bedford Stone Company v. O'Brien.

was nothing to indicate any unusual danger as appellee proceeded to descend at the time he was hurt. The traveler, with its chords, rods, and appurtenances, was very heavy, weighing from eighteen to twenty tons. The usual mode of moving the traveler on its trucks was by pinch-bars applied to the wheels resting on the iron rails of the tramways, and the appellee had helped to move it by such pinch-bars. When the traveler was at rest the wheels were kept in place by "chocks," or small wedges of wood slipped under them. This was not done on the day of the accident, but was done on all other days. Appellee knew that before that time the machine had been kept "chocked," but did not know that this had been neglected on the day in question. Had the wheels been chocked as usual the wind could not have moved the traveler. The jury find that if the traveler had not been put in motion by the wind appellee would not have been hurt; they also find that appellant, at and before the time of the accident, knew that, in order to prevent the traveler from being moved by a sudden gust of wind, it was necessary to chock it by placing small pieces of wood under the wheels, but that appellant on that day failed to see whether the machine was chocked or not, or to give appellee any instruction in relation thereto. It is also found that another means used to keep the traveler in position was by a rope with weight, but that no such means of safety was resorted to on this day. They find further that appellee, giving due care to his personal safety at the height where he was at work, and giving due attention to his work, could not have discovered that the machine was not chocked or braced, without making close inspection of each wheel, and that it would require special inspection to make such discovery. At the time of the injury appellee's duty required him to go to the ground

The Salem-Bedford Stone Company v. O'Brien.

from his work under the cab. He had gone down in safety before on that day. On his way down, on the occasion of the injury, the shaft of certain bevel-gearing attached to the trucks was in his pathway. This shaft was about twelve inches below the beam of the truck, and formed a step on the way from the truck down to the tramway. The shaft was stationary when he put his foot upon it, and apparently as safe a place to step as anywhere else. While his foot was yet on the shaft a gust of wind struck the traveler, and the shaft suddenly revolved and caused appellee's ankle to be drawn into the bevel gearing, and thereby crushed. It is found that at the time when appellee went from his place of work to the point where he was injured he could not have seen that the traveler was not chocked. No other findings made by the jury show the facts to have been different from those above set out.

No question is made as to the negligence of the appellant; and that the company was negligent, as alleged in the complaint, is in no way controverted. For some reason not shown, the traveler was not on this occasion made secure either by chocks, or by rope and weight, as had been done theretofore, and as was necessary to keep it from being moved by the wind, as well known to the appellant. Appellee knew nothing of this neglect, and had no reason to suspect it. He could not see under the wheels on his precarious way down, and knowing that they had been chocked on other days, had a right to believe that they were also secured on this occasion. The shaft was used as a step on his pathway and seemed as safe a place to step as any other on his way down. Suddenly, and without any warning, while his foot was yet upon the shaft, the wind started the traveler and he was injured. We can discover no negligence on the part of

Drew v. Town of Geneva.

appellee, and we think the findings show conclusively that he was free from any act contributing to his injury. He was injured in the line of duty, without his fault, and by reason of the neglect of appellant in failing to secure the traveler in its place. As these findings are supported by the evidence, no error is shown. Judgment affirmed.

DREW v. THE TOWN OF GENEVA.

[No. 18,571. Filed June 14, 1898.]

150	668
158	638
150	662
158	104
1150	662
1170	644

MUNICIPAL CORPORATIONS.—Improvement of Streets.—Authority of Board of Trustees of Town.—The board of trustees of an incorporated town is invested with plenary powers and exclusive jurisdiction over the streets and the improvement and repair thereof. *pp.* 664, 666.

SAME.—Improvement of Sidewalk in Manner Different from that Provided by Ordinance.—Injunction.—An incorporated town, having by ordinance provided for the improvement of a sidewalk according to certain plans and specifications, may enjoin an abutting property owner from making the improvement in a manner materially different from that provided by the ordinance. *pp.* 665-668.

APPEAL.—Bill of Exceptions.—A bill of exceptions must be signed by the judge before it is filed with the clerk. *p.* 668.

From the Adams Circuit Court. *Affirmed.*

Lewis C. DeVoss and *Robert S. Peterson*, for appellant.

France & Merryman, for appellee.

JORDAN, J.—The incorporated town of Geneva instituted this action to enjoin appellant from paving the sidewalk of that part of a certain public street in said town which abuts upon lots owned by the latter. The appellant unsuccessfully demurred to the complaint, and under the issues joined, upon the trial, there was a finding in favor of appellee, and over appellant's motion for a new trial a judgment was rendered enjoining him from paving the sidewalk in controversy. The

Drew v. Town of Geneva.

errors which are properly assigned arise out of the overruling of the demurrer to the complaint, and in denying the motion for a new trial.

It is shown by the averments in the complaint that appellee is an incorporated town, situated in Adams county, Indiana, and that on July 24, 1896, its board of trustees, by an ordinance duly passed and adopted, ordered that the sidewalk of the west side of all that part of High street lying between Line street and the north corporation line be graded and paved at the expense of the abutting owners. The ordinance directed that the sidewalks be paved with "sawed sand stone" of first class material, not less than four feet wide and two inches thick, to be laid on four inches of sand with two strips of good solid white or bur-oak lumber, 1 x 2 inches, to be placed beneath the paving stones four inches from the edge, running parallel with the sidewalk. The paving stones were to be laid so that the surface thereof, when joined, shall be as nearly level as possible. In the event the abutting property owners should fail to construct the sidewalk as directed within sixty days after the adoption of the ordinance, then it was provided that the marshal of the town was authorized, after giving the statutory notice, to let the work to the lowest responsible bidder, etc. It is disclosed that appellant is the abutting owner of lots 386 and 388, and that during the sixty days allowed for the construction of the walk he had failed and refused to pave his portion of said walk as ordered, and that he still continues to refuse to pave the same according to the specifications and provisions of the ordinance. After the expiration of the time allowed by the ordinance for the abutting owners to construct the improvement in question, and upon appellant's failure and refusal to perform the work as required by the ordinance, the town marshal proceeded to post

Drew v. Town of Geneva.

up the proper and necessary notices preparatory to letting out the work to the lowest bidder, as directed by the ordinance. After the posting of these notices, it appears that appellant, without the consent of the board of trustees, began to pave his portion of the sidewalk with brick, and it is alleged that he is "now threatening that he will construct said walk with brick, in disregard of the provisions of the ordinance, and will carry out his said threat and purpose unless enjoined." It is further shown by the averments of the complaint that if appellant proceeds to pave the walk with brick, in violation of the ordinance, that by so doing he will cause great damage to the entire sidewalk, and that the same will greatly interfere with the grading and paving of the west part of said High street. The prayer is that he be enjoined from constructing said walk with brick or any other material except that specified in the ordinance.

The only objection urged against the sufficiency of the complaint is that the ordinance, set out as a part, is defective, and that, under the circumstances, an injunction will not lie to prohibit appellant from paving with brick the sidewalk of the street upon which his lots abut. The insistence of appellant's counsel, in part, seems to be that he has the right to do so over the objections of the proper municipal authorities.

The board of trustees of incorporated towns is invested with exclusive power and jurisdiction over the streets, alleys, and highways of their towns. Section 4404, Burns' R. S. 1894 (3367, R. S. 1881). The board of trustees is also authorized to superintend the grading, paving and improving of streets, and the building and repairing of sidewalks. Section 4352, Burns' R. S. 1894 (3328, R. S. 1881). Section 4394, Burns' R. S. 1894 (3357, R. S. 1881), invests the board with the power to pass an ordinance compelling abutting own-

Drew v. Town of Geneva.

ers to grade, pave, or plank the sidewalks of a street upon which their property abuts. Section 4395, Burns' R. S. 1894 (3358, R. S. 1881), provides that such ordinance shall specify the height of the grade, if the grade is to be altered, the width of the pavement, and the time within which the work must be done. The next two sections respectively provide for the letting of such work by the marshal, if the property owner fails or refuses to grade, pave, or plank the walk as required in the ordinance, and for a recovery against him by the town of his proportionate amount of the cost. That the board of trustees of an incorporated town, under the provisions of the law to which we have referred, is invested with plenary powers and exclusive jurisdiction over the streets and the improvement and repair thereof, are questions too well settled to be open to controversy. *Keith v. Wilson*, 145 Ind. 149. In the ordinary acceptance, the term "street" includes sidewalks. *Taber v. Grafmiller*, 109 Ind. 206; *Wiles v. Hoss*, 114 Ind. 371.

The board of trustees, therefore, being invested by the legislature with these exclusive powers relative to the public streets over which it exercises jurisdiction, it certainly and necessarily must follow that an abutting owner of property has no right, without the permission of the board, properly granted, to make permanent improvements in respect to such streets, or any part thereof; and if he insists on doing so, in defiance of the ordinance of the board of trustees, as the facts in this case develop that the appellant is attempting to do, an action for injunction, in the name of the corporation, at the instance of the board of trustees, will lie to prevent him. An owner of property in a town, who has permitted to elapse the time allowed in the ordinance adopted by the proper municipal authorities for the paving or improving of

Drew v. Town of Geneva.

a sidewalk, in accordance with such ordinance, will not be allowed to interfere with the plan adopted, nor to embarrass such authorities in having the proposed work constructed in the manner ordained; and if he insists in his interference by attempting to make such street improvements, an action for injunction against him will lie at the suit of the municipality. Elliott on Roads and Streets, pp. 297, 298, 310, 311.

If one property owner, after lying by until the expiration of the limit for making a proposed street improvement, could rightfully insist on constructing that part thereof adjoining his property according to his own plan, and in the manner consistent with his own views, then each and all of the other owners, with equal propriety and right, might insist, and would be entitled, under the same circumstances, in like manner, to construct their portion of the work; and, if permitted to carry out their insistence, the result, no doubt, would be an incongruity, or total lack of symmetry in the construction of the work.

The attempt of the property owner, or owners, to make an improvement over the objections of the municipal authorities, would at least tend to embarrass and hinder the latter in their legal right to let out the work under a contract, and thereby have it constructed as contemplated by the ordinance.

It is a well settled principle of law that the easement which the public has in a street or highway the owner of the fee has no right to permanently or materially disturb. Elliott on Roads and Streets, p. 311.

Such owner certainly has no right to undertake to improve a public street permanently, or any part thereof, according to his own volition, and thereby interfere with or disturb the public authorities in the exercise of the powers with which, under the law, they

Drew v. Town of Geneva.

are vested and are endeavoring to carry into effect. An incorporated town, through its board of trustees, has such an interest in having street improvements made in compliance with the general plan or scheme adopted, and in the manner as ordered by such trustees, that it may successfully maintain an action for injunction against the owner of abutting property who attempts to make the improvement in a manner materially different from that directed by the board. If not, then certainly the statutory powers with which the latter is invested, with respect to streets, their improvement and repair, would be rendered nugatory and of no avail.

The soundness of the principle that equity will not assume jurisdiction nor award relief where there is a full, complete, and adequate remedy at law cannot be controverted. In this case, however, we are not aware of any legal remedy which could have been resorted to that would have been, under all the circumstances, either full, complete, or adequate. Jurisdiction in equity, it is affirmed by the authorities, depends not so much upon the want of a legal remedy, as upon its inadequacy, and its exercise is a matter which frequently rests in the sound discretion of the court. Or, in other words, the court may determine, under all the circumstances of the case, and in view of the conduct of the parties, whether the legal remedy is sufficient for the purpose of awarding complete justice or whether the intervention of a court of equity may not for that purpose be required and beneficially applied. Bispham's Principles of Equity, section 484, and authorities there cited.

If the ordinance in question is impressed with the infirmities which appellant urges against it, and which, as he insists, render it uncertain and thereby invalid, he has his remedy; but this would not warrant

The Board of Regents, etc., v. Daily, Auditor.

him in his effort to construct the work in dispute without the consent and over the objections of the proper municipal authorities. The court did not err in overruling the demurrer to the complaint.

Other questions discussed by counsel for appellant depend upon the evidence, and as it is not properly in the record, we cannot give these any consideration. What purports to be a bill of exceptions, embracing the evidence and matters incident thereto, appears to have been filed on July 30, 1897. This bill was not signed by the trial judge, as shown by his certificate, until August 2, 1897. There is nothing to disclose that the bill was filed after it received the signature of the judge. That such filing was required in order to make it a part of the record on appeal is settled by repeated decisions of this court. *Makepeace v. Bronnenberg*, 146 Ind. 243; *Louisville, etc., R. R. Co. v. Schmidt*, 147 Ind. 638. Judgment affirmed.

THE BOARD OF REGENTS OF THE STATE SOLDIERS' AND
SAILORS' MONUMENT v. DAILY, AUDITOR
OF STATE.

[No. 18,472. Filed June 15, 1898.]

SOLDIERS' MONUMENT.—*Statutes Construed.*—*Expenses of Decoration of Monument.*—*From Which Fund Paid.*—Under the act of March 4, 1893 (Acts 1893, p. 305), re-appropriating the funds provided by the act of March 7, 1891, for the completion and decoration of the soldiers' and sailors' monument, construed with the act of March 6, 1895 (Acts 1895, p. 134), which substitutes a board of regents for the commissioners, and provides that they shall serve without pay, except necessary expenses, and an annual salary of \$1,500.00 to the president, to be paid out of the general fund of the State; the clay models from which the decorations of the monument known as the "Peace" and "War" groups, and the pumps and engines to operate the fountains, which were parts of the original plan for the construction of the monument, are essentials, and not merely incidental to the completion and decoration of the monument, and payment

The Board of Regents, etc., v. Daily, Auditor.

therefor cannot be made out of the general fund of the State, but must be paid out of the "monument fund" created by the special act.

From the Marion Circuit Court. *Affirmed.*

A. G. Smith, and C. A. Korbly, for appellants.

W. A. Ketcham, Attorney-General, for appellee.

HOWARD, J.—By an act approved March 3, 1887 (Acts 1887, p. 30), the General Assembly appropriated \$200,000.00, "for the purpose of erecting a State Soldiers' and Sailors' Monument, said appropriation to be used in connection with such other funds as have already been, or may hereafter be, donated and contributed for said purpose."

By an act approved March 7, 1891 (Acts 1891, p. 341), an additional appropriation of \$30,000.00 was made for the same purpose; and, by the same act, there was likewise appropriated the sum of five mills upon each one hundred dollars worth of taxable property in the State, to be assessed and collected in each of the years 1891 and 1892, as other taxes are assessed and collected; "which money," it was there provided, "when collected, shall be placed to the credit of, and known as the State Soldiers' and Sailors' Monument fund, and the same is hereby appropriated for the completion of said State Soldiers' and Sailors' Monument."

From the complaint, it appears that the funds realized from the five mills tax for 1891 and 1892 amounted to \$123,168.84, making the total appropriation by the State \$353,168.84.

By the third section of the act of 1891, the board of monument commissioners were required to give bond in the sum of \$100,000.00, conditioned that they would complete the monument, "in every particular, without any further cost or expense to the State of Indiana."

The Board of Regents, etc., v. Daily, Auditor.

By an act approved March 4, 1893 (Acts 1893, p. 305), section 3 of the act of 1891 was repealed, and the funds appropriated by the act were "re-appropriated for the completion and decoration of the said State Soldiers' and Sailors' Monument and surrounding grounds in such manner as the said board of commissioners may designate."

Finally, by an act in force March 6, 1895 (Acts 1895, p. 134), a board of three regents was substituted for the monument commissioners. In this act it was provided that the regents should serve without pay, except that they should be reimbursed for their necessary expenses, and that the president of the board should receive a yearly salary of \$1,500.00, "to be paid from any moneys in the State treasury not otherwise appropriated." It was further provided that the regents should discharge all obligations incurred by their predecessors, the commissioners, "and carry to completion, as far as may be desirable and practicable, the work heretofore entrusted to their supervision and control, and in accordance with the laws under which they acted."

Relying upon the provisions of the several statutes above referred to, the board of regents brought their action in the Marion Circuit Court for a writ of mandate to require the Auditor of State, "to transfer several sums of money paid by the State of Indiana upon warrants issued by said defendant [the appellee, Auditor of State], namely \$6,000.00 to Bruno Schmitz, of Berlin, Prussia, and \$2,500.00 to the Connersville Blower Company—classified as merely incidental expenses—from the fund known as the 'Monument Fund,' and to charge the same to and against the fund known as the 'General Fund,' in the treasury of the State of Indiana; and further commanding the defendant herein to draw a warrant in favor of the Capi-

The Board of Regents, etc., v. Daily, Auditor.

tal Machine Company of Indianapolis for three several installments of the contract price of the gas engines furnished by it for the State Soldiers' and Sailors' Monument, namely, the sum of \$1,033.33 1-3 each, upon the fund known as the 'General Fund,' in the said State treasury, on account of the incidental expenses in the completion and operation of said monument; and further commanding the defendant herein to draw his warrant in favor of said Bruno Schmitz for two installments of \$8,000.00 each, for the clay models, for the first and second groups, upon the fund known as the 'General Fund,' in the State treasury, upon the presentation, by said Capital Machine Works Company, and said Bruno Schmitz, respectively, of their respective certified accounts, and respective requisitions from said board of regents for such warrants, or show cause why the same should not be done."

To the alternative writ issued in compliance with the petition of the appellant, the appellee filed his answer and return, from which it appears that on or about the 22nd of May, 1896, the board of regents entered into contract with Bruno Schmitz, of Berlin, Prussia, to make and place in position upon the monument the groups of "War" and "Peace" and reliefs, according to designs and models accepted by the board, to be of the best Indiana oolitic limestone, and to be duly prepared and finished, and properly fitted and put in place upon the monument, and entirely completed by said Bruno Schmitz on the 1st day of August, 1898.

In the contract set out in the return, it is shown that Bruno Schmitz agreed "to do and furnish, or cause to be done and furnished, all incidental work of every kind, character and description relating to the making and putting in place, on said monument of said groups

The Board of Regents, etc., v. Daily, Auditor.

of 'War' and 'Peace' and reliefs, including the boxing and packing," save only that the transportation of models was to be at the expense of the board. For all such work duly performed and materials furnished, and the groups of "War" and "Peace" and reliefs completed, mechanically and as works of art, delivered and put in place upon the monument to the satisfaction and approval of the board, Schmitz was to receive "as full compensation for the entire work the aggregate sum of \$60,000.00," payable in stated installments as the work progressed.

The return also sets out the contract of the board with the Connersville Blower Company for the purchase, for \$2,500.00, of two cycloidal rotary pumps; and avers that they were to be placed in the crypt of the monument, and used to pump water from the wells to the fountains on either side of the monument.

The contract with the Capital Machine Company for the purchase, for \$3,100, of two gas engines, is also set out in the return; and it is averred that the engines were to be attached to the pumps aforesaid and so furnish power to supply water for the fountains. It is further averred that the fountains are a part of the original plan of the architect for the monument, and that the same are intended and designed to be and remain a permanent part of said monument and the decorations thereof. It is alleged in the writ, and is admitted in the return, that, of the amount appropriated for the construction and completion of the monument, there remains in the State treasury, to the credit of the monument fund, the sum of \$70,327.09.

In the petition and writ it is alleged that the cost of the pumps and gas engines and also the first, second, and fourth items, or installments, of the sum of \$60,000.00 paid, or to be paid, to Bruno Schmitz are incidental expenses of the building of the monument,

The Board of Regents, etc., v. Daily, Auditor.

which should be paid out of the general fund in the State treasury, and not out of the monument fund. But in the answer and return it is averred that all these items are a part of the structural expenses of the monument; that said groups of "War" and "Peace" and reliefs are attached to, and are integral parts of the monument, and that the pumps and engines are also permanently affixed to the monument as essential parts of its decorations. Hence it is insisted in the answer and return that payments for all these items should be made out of the funds which were appropriated by the legislature for the construction and completion of the monument, and not out of the general fund of the State treasury. A demurrer to this return was overruled by the court, and, the appellants refusing to plead further, judgment was rendered against them. The only error assigned is the ruling on the demurrer.

The contract with Bruno Schmitz provided that the \$60,000.00, to become due him for the groups of "War" and "Peace" and reliefs should be paid in nine installments, as follows: (1) At delivery of sketches, \$6,000.00; (2) at completion in clay, one-third natural size, of first group, \$8,000.00; (3) at completion of first group, in plaster of Paris, natural size, \$7,000.00; (4) at completion, in clay, one-third natural size, of second group, \$8,000.00; (5) at completion of second group, in plaster of Paris, natural size, \$7,000.00; (6) at delivery and placing in position on monument of stone for first group, \$5,000.00; (7) at delivery and placing of stone for second group, \$5,000.00; (8) at completion of work on first group, \$7,000.00; (9) at completion of second group, \$7,000.00.

The contract was for the whole work; and it would seem that the payments were to be made in install-

The Board of Regents, etc., v. Daily, Auditor.

ments, as the work progressed, merely for the convenience of the contractor and the security of the State. It is not easy to see any other distinction in the items, or why the first, second, and fourth should be picked out and called incidental, as appellants contend for, while the remainder should be considered as structural. The nine items were all equally essential to the completion of the whole work. The commissioners in allowing payment of the first item do not seem to have then regarded it as in any manner incidental. The certificate of the secretary shows that this item "was allowed and ordered to be charged to the account of construction by the board of commissioners of the State Soldiers' and Sailors' Monument, on the 23rd day of May, 1896." The order for the warrant, given by the president of the board for the same item, also shows that it was to be paid, not out of the general fund, as now demanded, but "out of the State Soldiers' and Sailors' Monument fund." We have read the record carefully, and also the brief of appellant, and have there sought in vain for any plausible reason to show that the view then entertained by the commissioners was not the correct one, and that the item was not for the construction of the monument, but incidental thereto, and hence not rightly paid out of the monument fund in the State treasury. The same original view entertained by the commissioners is shown in the orders of allowance and warrants for pumps purchased of the Connersville company. The accounts were "allowed and ordered to be charged to account of 'structural' by the board of commissioners;" and the president's orders for warrants were that payment for the pumps was to be "out of the State Soldiers' and Sailors' Monument fund."

The appellants, however, now contend that the action then taken was erroneous, and that the pay-

The Board of Regents, etc., v. Daily, Auditor.

ments for pumps, gas engines, sketches of "War," "Peace" and reliefs, and completion of groups, in clay, one-third natural size, should have been made out of the general fund, and not out of the monument fund; for the reason, as we understand counsel, that these items were merely incidental, and were not essential to the structure, completion, and decoration of the monument. We confess to a total inability to understand this reasoning of the learned and able counsel for appellants. Since they went so far in their claim for incidentals, we are at a loss to know why they did not go further. If clay models, one-third natural size, are but incidentals in the work, why are not plaster of Paris models, full size, also incidentals? Those plaster of Paris models cost \$7,000.00 for each group, and, if appellants' contention be tenable, we see no reason why they should not be claimed as incidentals, to be paid for out of the general fund in the State treasury, quite as well as the clay models. The plaster models have not actually gone into and formed a part of the structure of the monument, any more than the clay models. As we view the question, however, the doing of the work on the models, whether of clay or of plaster, was quite as much a part of the whole work committed to Bruno Schmitz as was the taking of the Bedford stone out of the quarry, the cutting, chipping, and polishing of the same, or any other preliminary work needed for the finishing and final placing in position of the noble groups and reliefs that are to adorn the great monument. None of the work is merely incidental; each and all is essential to the completion of the mighty whole.

Certain decisions of this court are cited in support of the contention that the items referred to should be classed as incidentals, and not as structural, expenses. The cases cited were of an unusual character, involv-

The Board of Regents, etc., v. Daily, Auditor.

ing, as they did, extraordinary public interests, and even necessities. Cases of hardship sometimes result in extreme decisions; and we do not think that the rule said to have governed in the cases named, even if it were such as contended for, ought to be extended further than absolutely necessary. The controlling rule to be followed in such a case as that before us must be, that no money should be drawn from the public treasury except as expressly provided for in the act making the appropriation.

In the act of March 14, 1877, for the erection of the State-house (Acts 1877, Sp. Sess., p. 68), it was provided, amongst other things, that "when it becomes necessary they [the State-house commissioners] shall cause the old building to be removed, and they shall provide temporary quarters for the General Assembly, and for the officers now occupying the present building." The act contemplated the erection of the State-house at a cost not to exceed \$2,000,000.00. In *Williams v. Mansur*, 70 Ind. 41, the question was whether, in view of those provisions of the act, the rent of the temporary quarters provided for some of the State officers should be paid out of the new State-house fund, or out of the general fund. It would seem that this rent was clearly an incidental expense, and that the authority given the commissioners to select such necessary quarters for the transaction of the business of the State was a sufficient appropriation for payment of the rent out of the general fund. The court, however, held that the rent should be paid out of the fund raised for the erection of the new State-house. The foregoing decision was somewhat modified in *Board, etc., v. Whittaker*, 81 Ind. 297, where it was held "that it was the legislative intention, that the sum of \$2,000,000.00 might be expended in the construction of the new State-house; and that, in ad-

The Board of Regents, etc., v. Daily, Auditor.

dition thereto, all incidental expenses, such as salaries and traveling expenses of the board, compensation of architect, secretary and superintendent, rents, etc., may be paid out of the fund denominated the 'New State-house Fund.'"

In *Campbell v. Board, etc.*, 115 Ind. 591, it was held that the \$200,000.00 appropriated by the act of 1887 for the erection of the Soldiers' and Sailors' Monument must "be devoted to the *structural* work of the monument, and hence not to merely incidental expenses, which do not enter into the cost value of the edifice, and which must be otherwise paid." The incidental expenses there in controversy were, "the salaries of such commissioners, the salary of their secretary, and other incidental expenses."

Following these cases, came *Henderson v. Board, etc.*, 129 Ind. 92, 13 L. R. A. 169, where it was held that the act of 1887, making the \$200,000.00 appropriation for the monument, authorized, by implication the payment out of the general fund in the State treasury of incidental expenses connected with the building of the monument. The items there in controversy, and allowed as incidental expenses, were the following: Payment of architects, commissioners' per diem, traveling and hotel expenses, engineering, experts, attorneys, office and miscellaneous, secretary's salary, printing and stationery, superintendence, advertising, and removal of the Morton monument.

Without questioning the correctness of the foregoing decisions, we are unable to see that they have any application to the case before us. There is here no question of salary, or other expense regarded as incidental in those cases. Indeed it would seem that the last act of the legislature, *supra* (Acts 1895, p. 134), was expressly directed against the allowance of any incidentals, except as in the act itself particularly

The Board of Regents, etc., v. Daily, Auditor.

mentioned. It is provided in the fifth section of that act that the necessary expenses of the members of the board, and also a salary of \$1,500.00 for the president, "be paid from any moneys in the State treasury not otherwise appropriated." The legislature thus made an express appropriation out of the general fund for the payment of what were doubtless then regarded as the only incidental expenses likely to be incurred by the board.

It is at least certain, as we think, looking at all the acts of the legislature upon the subject, that the items of expense here in controversy cannot be regarded as incidental. They are parts of the total cost of the monument, and to be paid for out of the fund appropriated by the General Assembly "for the completion and decoration of the said Soldiers' and Sailors' Monument and surrounding grounds in such manner as the said board of commissioners may designate." The groups of "War" and "Peace" and reliefs are to be put in place in the monument, under a single contract, for \$60,000.00. Every item of that contract is essential, and not incidental, to "the completion and decoration of the said Soldiers' and Sailors' Monument." The fountains, too, are parts of the original plans of the architect for the "decorations of the said Soldiers' and Sailors' Monument and surrounding grounds;" and hence the pumps and engines, without which the fountains could not exist, are also essential, and not merely incidental, to the completion and decoration of the monument and grounds. The items in controversy should therefore be paid out of the monument fund, and not out of the general fund in the State treasury. Judgment affirmed.

Robinson & Company v. Hathaway et al.

ROBINSON & COMPANY v. HATHAWAY ET AL.

[No. 18,809. Filed June 16, 1898.]

150	679
152	542

APPEAL AND ERROR—*Failure to Discuss Error Assigned.—Waiver.*

The failure of appellant to discuss an error assigned amounts to a waiver of such error. p. 680.

SPECIAL FINDING.—*Evidence.—Weight Of.*—In determining whether a special finding is sustained by the evidence the Supreme Court will consider only such evidence as tends to sustain the finding. p. 681.

PARENT AND CHILD.—*Support of Child.*—Evidence showing that a boy eleven years of age, his mother being dead, was placed by his father with a woman, with the request that she care for him until the father was settled again; that shortly thereafter the boy inherited an estate from his grandmother, which, when he arrived at twenty-one years of age amounted to \$1,400.00; that no agreement was made with the father to keep the boy, and no pay was demanded of him; that the father married again, but never called for the child, shows an indebtedness on the part of the boy sufficient to support a consideration in a deed of conveyance executed by the boy, in payment for his support, of real estate worth \$1,700.00, subject to a mortgage of \$800.00, where it was further shown that the boy was supported and cared for until he was twenty-one years of age, and during such time was sent to school and performed no services of any value, and the only compensation received for such support was the real estate conveyed. pp. 681-683.

SAME.—*Emancipation of Child.*—A child may be released from parental control, by the consent of the parents, or by abandonment and failure of the parents to support the child, and when thus released, the child becomes entitled to his earnings, and liable for his necessary support. p. 683.

From the Whitley Circuit Court. *Affirmed.*

Thomas R. Marshall, William F. McNagny and P. H. Clugston, for appellant.

Andrew A. Adams, for appellees.

MONKS, J.—Appellant brought this action to set aside a conveyance of real estate made by appellee, Hathaway, to his co-appellee, Nancy Graham, as fraudulent, and subject the same to the payment of a judgment recovered by appellant against said Hathaway and others.

Robinson & Company v. Hathaway et al.

The court made a special finding of the facts, and stated a conclusion of law thereon in favor of appellees, and, over appellant's motion for a new trial, rendered judgment against appellant. Appellant filed a motion to modify the judgment, which was overruled.

The assignment of errors calls in question the conclusion of law, the action of the court in overruling the motion for a new trial, and the motion to modify the judgment.

Appellant having failed to discuss the error assigned as to the conclusion of law, the same is waived. *Chicago, etc., R. W. Co. v. Hunter*, 128 Ind. 213, 221; *Williams v. Potter*, 72 Ind. 355, 357; *Carper v. Kitt*, 71 Ind. 24, 26; *Boyd v. Fitch*, 71 Ind. 306, 313.

The finding of the court upon the question of consideration is substantially as follows: About the month of February, 1884, appellee, Delmar H. Hathaway, came to the home of appellee, Nancy Graham, and has ever since resided there; they were in no way related to each other, and at the time he was received into her home there was no contract or agreement with reference to the charge to be made for his keeping, and that the services rendered by her in boarding, washing for, mending, making his clothes, and furnishing him with whatever was needful for his comfort and convenience were worth one hundred dollars per year. Soon after he reached the age of twenty-one years he recognized and acknowledged his debt to her. In February, 1894, about the time she commenced to care for said Hathaway, he received an estate from his grandmother which, when he arrived at twenty-one years of age, Feb. 5, 1893, amounted to \$1,400.00, which was paid over to him by his guardian James Arnold, on Feb. 10, 1893. On March 23, 1893, he purchased the real estate in controversy, for which he gave his note

Robinson & Company v. Hathaway *et al.*

for \$800.00, secured by a mortgage on the premises, and paid the balance of the purchase money in cash. On November 18, 1895, said appellee Hathaway was justly in debt to said Nancy Graham in the sum of \$1,200.00, for care and maintenance for the twelve years immediately preceding said date, and on said day he conveyed the real estate in controversy to her in payment of said indebtedness, she assuming the payment of the mortgage thereon which amounted to about \$800.00, and she has paid on said mortgage \$210.00; that said real estate was worth at the time of said conveyance \$1,700.00, and that the consideration she paid for said real estate was full, valuable and adequate, and said conveyance was not executed or received to defraud appellant, but was made to pay a just debt.

Appellant insists that the said finding as to the consideration for the conveyance of said real estate was not sustained by the evidence, and for that reason the court erred in overruling the motion for a new trial.

In determining whether said finding as to the consideration paid was sustained by the evidence, we can only consider such evidence as tends to sustain the finding, disregarding any evidence to the contrary, for the reason that if there is evidence sustaining the same, even though there may be evidence to the contrary, we can not weigh it, or determine the credibility of the witnesses.

There was evidence, in substance, that when Delmar H. Hathaway was about eleven years old his mother died, and his father William H. Hathaway intending to break up housekeeping, requested Mrs. Graham to keep him a while, until he, the father, was settled again. William H. Hathaway afterwards married, but never came after the boy; there was no agreement with the father to keep the boy, and she never de-

Robinson & Company v. Hathaway et al.

manded any pay from him for keeping him, but expected to demand it of the boy when he was of age. Before Delmar H. Hathaway received the \$1,400.00 from his guardian, he spoke to Mrs. Graham about paying her for keeping him, but no amount was mentioned at that time. They talked about the matter at different times, and she wanted her money. A short time before the conveyance was made he agreed to pay her \$1,200.00, and told her that he would deed her the land in controversy in payment of his indebtedness to her, and she objected for the reason that it was not enough to pay her, and he said it was the best he could do. On November 18, 1893, he delivered her the deed for the land, which she accepted. The consideration named in the deed was \$1,200.00. Said Hathaway lived at the house of Mrs. Graham from the time he went there after his mother's death, until said deed was executed. He was sent to school during his minority, and performed no service of any value for Mrs. Graham. The only compensation she received for keeping and raising him until he was twenty-one, and for his boarding, lodging, washing, mending and making his clothes from the time he was twenty-one until the deed was made, was said real estate.

Appellant insists that the evidence shows that the conveyance was voluntary, and was not based on a valuable consideration, for the reason that the law imposed the duty upon William H. Hathaway to maintain his son Delmar, and as he left his son with Mrs. Graham, the law implied a promise on his part to pay her for her services and expenses in keeping and taking care of Delmar; that the indebtedness to Mrs. Graham was due from the father and not from the son.

We think the evidence authorized the court to find that the father by his failure to look after his son, or take care of him in any way, or to compensate those

who did, had emancipated him from the time he was received by Mrs. Graham. A child may be released from parental control, and become entitled to his earnings, and liable for his necessary support, in which event, he is said to be emancipated. Emancipation may be effected by the consent of the parent, evidenced by a written or oral agreement, or from the circumstances when the parent abandons or fails to support the child. *Tiffany's Persons and Dom. Rel.*, p. 260-265; *Wood Mast. and Serv.*, section 25; 14 *Am. and Eng. Ency. of Law*, 756-759; *Jenison v. Graves*, 2 *Blackf.* 440, 449, 450; *Hollingsworth v. Swedenborg*, 49 *Ind.* 378, 19 *Am. Rep.* 678; *Wilson v. McMillan*, 62 *Ga.* 16; *Hall v. Hall*, 44 *N. H.* 293; *Farrell v. Farrell*, 3 *Houst. (Del.)* 633.

In *Hollingsworth v. Swedenborg*, *supra*, this court quoted with approval from *Farrell v. Farrell*, *supra*, the following: "And although the general principle is clear and unquestioned, that the father is entitled to the services of his minor child, and to all that such child earns by his labor, yet, it seems equally clear, that, as the right of the father to the services of the child is founded upon his duty to support and maintain his child, if he should fail, neglect, or refuse to observe, and perform this duty, his right to the services of his child should cease to exist. And such we hold is the law." In this case the father left his minor son temporarily with a neighbor, but never afterwards requested his return, or offered to pay for his maintenance and support; such conduct on the part of the father from the time his son was eleven years of age until he reached twenty-one was sufficient to sustain a finding that there was an emancipation of the son. The acts of the parties, Mrs. Graham and the father, clearly show that it was not the intention that the father should pay Mrs. Graham, but that it was the

The Building and Loan Association of Dakota v. Coburn.

intention that she should look to the estate of the son for compensation. The son had an estate of his own which he inherited about the time he went to live with Mrs. Graham, and when he became of age, as found by the court, he recognized and acknowledged his indebtedness to Mrs. Graham for his support and maintenance during his infancy. There can be no question as to his indebtedness to Mrs. Graham for his board, lodging, etc., after he became of age until the deed was made. The land was only worth \$1,700.00, it was subject to a mortgage for \$800.00, and was received by Mrs. Graham in payment of an indebtedness of \$1,200.00, which was \$300.00 more than the value of the land after deducting the mortgage.

We think that there was evidence showing that Delmar H. Hathaway was indebted to Mrs. Graham in the sum of \$1,200.00, as found by the court, and that said indebtedness was the consideration for such conveyance.

What we have already said disposes of the question presented by the motion to modify the judgment. The judgment is affirmed.

THE BUILDING AND LOAN ASSOCIATION OF DAKOTA
ET AL. v. COBURN.

[No. 18,441, Filed June 16, 1898.]

MECHANIC'S LIEN.—Mortgages.—Priority.—Under the provision of section 7256, Burns' R. S. 1894, that the lien of a mechanic attaches to the building and to the interest of the owners in the lot or land, and, where "the land is encumbered by mortgage, the lien, so far as concerns the buildings erected by said lien holder, is not impaired by * * * foreclosure of the mortgage, but the same may be sold to satisfy the lien," etc., the holder of a mechanic's lien has precedence, as to the building itself, over a mortgage, executed on the lot, prior to the construction of the building thereon, although the money for which the mortgage was executed was expended in the construction of such building.

The Building and Loan Association of Dakota v. Coburn.

From the Marion Superior Court. *Affirmed.*

Charles A. Dryer, for appellants.

John Coburn and G. W. McDonald, for appellee.

HACKNEY, C. J.—The questions in this case involve title to real estate and priority of liens, and arise upon a special finding of facts with conclusions of law. The facts specially found were that in November, 1891, one Collett was the owner of the real estate in question, and made an agreement to convey the same to Grace C. Brown when \$450.00; the balance of \$500.00 consideration therefor, should be paid. Grace C. Brown went into possession, and applied to the appellant association for a loan of \$1,600.00, which loan was granted, and a mortgage therefor was executed by her upon said real estate, and recorded July 12, 1892.

In August, 1892, said Grace C. Brown made a contract for the erection of a dwelling house, fences, etc., upon said real estate, for the price of \$1,525.00; that in August, September, and October, 1892, as the erection of said building progressed, said association paid upon the orders of said Grace C. Brown, \$1,000.00 upon the labor and materials employed in said improvements, and the sum of \$12.80 for fire insurance. In addition thereto said association retained from said loan, by agreement with said Grace C. Brown, \$300.50 dues, interest, etc., upon said loan, making thereby an advancement of \$1,313.30 upon said loan; that the contractors for the construction of said house and other improvements purchased from Henry Coburn and others lumber and other materials which were used in the improvements so made, and were never paid for, but for which liens were duly filed in the sum of \$741.87, and upon which, with interest and attorney's fees, the sum of \$823.87 is due; that the lot is of the

The Building and Loan Association of Dakota v. Coburn.

value of \$600.00 and the improvements are of the value of \$1,400.00; that pending the suit to foreclose said liens the executors of the estate of said Collett, now deceased, sold and conveyed said real estate, and transferred the notes of Grace C. Brown to William H. Coburn, appellant herein.

The court found as conclusions of law that William H. Coburn held a first lien upon the lot, apart from the building, for \$601.25, balance unpaid on the price agreed to be paid by Grace C. Brown for said lot; that Henry Coburn and the other mechanics' lien holders were entitled to first liens upon the buildings, apart from the lot; that the building and loan association was entitled to a second lien upon the lot, after that of William H. Coburn, and to a lien upon the buildings, after said mechanics' liens; and that William H. Coburn was entitled to a lien upon the buildings after the mechanics' liens and the building, etc., association lien thereon.

There has been considerable discussion as to whether section 7258, Burns' R. S. 1894 (section 4, act March 6, 1883), was repealed by the act of March 9, 1889 (Acts 1889, p. 257). The affirmation of this proposition includes the further inquiry as to whether the title of said act of 1889 sufficiently conforms to the constitution in expressing the subject, namely, the repeal of section 4.

The existence of that section we do not regard as important to the decision of this case. Sections 7255, 7256, Burns' R. S. 1894, clearly manifest the intention of the legislature to regard the lot upon which buildings are erected or improvements are made, apart from such buildings or improvements, in considering to what the lien shall attach, and as to the priorities between mechanic's liens and mortgages existing before the erections or improvements.

The Building and Loan Association of Dakota v. Coburn.

The lien of the mechanic attaches to the "building" and to "the interests of the owners" in the lot or land, and where "the land is incumbered by mortgage, the lien, so far as concerns the buildings erected by said lien holder, is not impaired by * * * foreclosure of the mortgage; but the same may be sold to satisfy the lien," etc.

The position of the association is that of a mortgagee of the lot before the buildings were erected, with no claim to a mechanic's lien in its favor, by reason of having contributed to the erection of the buildings, and no element of subrogation in its favor.

There is no contention that William H. Coburn was not entitled, as against the association, to precedence in lien upon the lot. As to the mechanic's lien the trial court gave the association precedence upon the lot. The only point of contention therefore, is between the mechanics' liens and the mortgage upon the buildings, the holders of each contending for the precedence. Much is said of the equities of the parties respectively, but the statute, section 7256, *supra*, provides that the mechanic's lien shall not be impaired by a foreclosure of the mortgage. This is equivalent to a declaration of precedence in favor of the mechanic's lien, and the fact that the association did not seek a foreclosure of its mortgage is not material. If in a foreclosure the mechanic's lien would not be impaired, the effect of the statute could not be defeated by a contest of priorities in advance of foreclosure proceedings.

In its essential features this case is like that of *Carriger v. Mackey*, 15 Ind. App. 392. Finding no error in the record, the judgment of the lower court is affirmed.

Mozingo v. Ross et al.

MOZINGO v. ROSS ET AL.

[No. 18,656. Filed June 17, 1898.]

LIMITATION OF ACTIONS.—Principal and Surety.—Bills and Notes.—Partial Payment.—The partial payment of a promissory note by the principal debtor will not suspend the statute of limitations as to the surety. pp. 690-693.

SAME—Principal and Surety.—Bills and Notes.—Absence of Principal from State.—The absence of the principal debtor of a promissory note from the State will not suspend the statute of limitations as to the surety. pp. 690-693.

From the Hamilton Circuit Court. *Affirmed.*

James M. Fippen and James M. Purvis, for appellant.

Fertig & Alexander, for appellees.

JORDAN, J.—This action was commenced by appellant on March 2, 1897, to recover a judgment on a promissory note, and also to set aside an alleged fraudulent conveyance of land by the appellee, Moses M. Ross, to his co-appellee, Martha Price, and to subject the lands so conveyed to the payment of the judgment sought to be recovered upon the note.

The note in suit appears to have been executed on December 20, 1882, by one Francis M. Ross, together with the appellee, Moses M. Ross, to appellant, for the sum of \$150.00, due in twelve months after the date thereof. The following partial payments seem to have been made on the note, and indorsed thereon, as shown by a copy filed as an exhibit with the complaint, to wit: September 26, 1883, \$12.00; January 6, 1887, \$20.00, as interest; December 24, 1887, \$15.00; November 27, 1889, \$57.57; December 13, 1889, \$20.00.

Among other defenses interposed by the appellee, Moses M. Ross, under his separate answer, against a recovery upon the note, was the statute of limitations of ten years. Appellant replied to this answer in

Mozingo v. Ross *et al.*

three paragraphs, but subsequently dismissed the first and second. The third paragraph of the reply, in avoidance of the defense of the statute of limitations set up by the appellee, Moses M. Ross, averred that said Ross had executed the note in suit as the surety for one Francis M. Ross, and alleged the truth to be that said Francis M., the principal, had made the various partial payments on the note, as set out in the exhibit filed with the complaint, and that long before ten years had elapsed after the execution of the note, to wit: Within six years after its execution, said principal, Francis M., with the knowledge and consent of the defendant, Moses M. Ross, his surety, but without the knowledge or consent of the plaintiff, removed from the State of Indiana, and became a non-resident of said State, and has so remained and continued to be a nonresident up to the present time, and by reason of his being such nonresident, it is alleged that the plaintiff could not proceed against him, as the principal, for a judgment on the note. A demurrer was sustained to this paragraph, and, appellant refusing to plead further, judgment was rendered that she take nothing by her action, and that the defendants recover of her their cost.

The sustaining of the demurrer to the third paragraph of reply is the only error assigned. Appellant insists that the facts alleged in the reply were sufficient to avoid the defense of the statute of limitations set up in the answer. The questions presented for decision are, first, will a partial payment by a principal debtor suspend the running of the statute of limitations in favor of his surety? Second, will the absence of the principal debtor from the State suspend the statute in favor of such surety?

Passing the consideration of the infirmities that are

Mozingo v. Ross et al.

urged against the pleading in controversy, to the effect that it pleads evidence instead of facts, and that it is deficient in not setting out the partial payments made, instead of referring to them only, as shown by the exhibit filed with the complaint, we proceed to determine the real questions discussed by the counsel of both parties to this appeal.

Section 302, Burns' R. S. 1894 (301, R. S. 1881), relative to the statute of limitation, provides: "No acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take the case out of the operation of the provisions of this act, unless the same be contained in some writing signed by the party to be charged thereby." Section 303, Burns' R. S. 1894 (302, R. S. 1881), provides: "The acknowledgment or promise of one joint contractor or executor or administrator, shall not render any other joint contractor, executor, or administrator liable under the provisions of this act." The next section, 304, declares that "Nothing contained in the preceding sections shall take away or lessen the effect of any payment made by any person," etc. It is the settled rule that an admission of continued indebtedness may be inferred from the fact of part payment by a debtor. Such inference, however, is not one of law, but of fact. The payment is only *prima facie* evidence of the acknowledgment or admission of the debtor, and is subject to be rebutted by other evidence and the circumstances under which it was made. *Carlisle v. Morris*, 8 Ind. 421; *Willey v. State, ex rel.*, 105 Ind. 453.

The statute, as we have seen, declares that no acknowledgment or promise shall be evidence of a continuing contract to take the case out of the operation of the statute unless it be in writing signed by the party to be charged thereby. It is further provided that the promise or acknowledgment of a joint con-

Mozingo v. Ross *et al.*

tractor shall not have the effect to render any other joint contractor liable. It is expressly declared, however, that these provisions of the law shall not take away or lessen the effect of any payment made by any person, consequently they leave the effect of a partial payment untouched. The rule applicable to a payment, in taking a case out of the provisions of the statute of limitations, or rather, extending the time during which the action may be commenced, does not depend on any provisions of the statute of limitations, but is the result of judicial decisions, and the reason of the rule depends wholly upon such decisions. The reason upon which the rule is said to rest, is that a partial payment, voluntarily made by a debtor, upon a claim or debt, is in the nature of an acknowledgment or admission by him of his liability for the whole demand, and, from the fact that he made the payment, a new promise on his part to pay the remainder of the debt may be implied, and, under this legal inference, such new promise arises at the time the partial payment is made. The origin of the rule is fully considered and set forth in *Van Keuran v. Parmelee*, 2 N. Y. 523. It must be evident, we think, that, to bring the case within the reason of the rule, the payment should be made by the party to be charged with its effect, or by his agent duly authorized so to charge him. A partial payment, being treated by the law as nothing more than *prima facie* evidence of an admission or acknowledgment that the debt is due, it would seem, in reason, that it could and should only affect the party that makes it, unless he has authority to speak for others as well as himself. This doctrine finds support in the well affirmed rule that the acknowledgment of a debt made by one partner after the dissolution of a partnership, is not sufficient to take the case out of the operation of the statute of

Mozingo v. Ross et al.

limitations as to the other partners. *Yandes v. Le-favour*, 2 Blackf. 371; *Kirk v. Hiatt*, 2 Ind. 322.

In the case of *Bottles v. Miller*, 112 Ind. 584, it is held that a payment upon a promissory note by one joint and several maker will not defeat the operation of the statute of limitations as to any other maker, nor deprive the latter of his right to avail himself of the statute as a defense. While the question in that case does not appear to have been very fully considered, the decision thereof seemingly being controlled by the construction which the learned judge, speaking for the court, placed upon the statute of limitations, we are, however, satisfied, in view of the authorities, that the conclusion reached by the court upon the question in that appeal was correct.

The statute, as heretofore said, in effect declaring that the acknowledgment or promise of one joint contractor will not take the case out of its operation as to any other joint contractor, no sufficient reason can be given, nor would any seem to exist, that would make a partial payment more potent in its effect than an express acknowledgment or promise by a debtor. Especially ought this to be true, in view of the fact that such payment is treated by the law as evidence only of a new promise to pay the remainder of the debt. We are of the opinion, and so hold, that the correct and better rule is that a partial payment can serve only to suspend the running of the statute of limitations as against the party making the payment, by himself or duly authorized agent, and the fact that the one making the payment is the principal debtor does not alter nor change the rule as to other debtors who executed the note or obligation as his sureties.

We are aware that there are decisions of the higher courts of sister states which hold that the payment by one or more parties jointly and severally liable

Cooper v. Bartlett et al.

upon a note or other obligation, made before the limitation attaches, will suspend the running of the statute in favor of the others, but the great trend of the decisions of courts of other states sustain the conclusion we have reached, among which are the following: *Van Keuran v. Parmelee*, *supra*; *Shoemaker v. Benedict*, 11 N. Y. 176; *Winchell v. Hicks*, 18 N. Y. 558; *McLaren v. McMartin*, 36 N. Y. 88; *Harper v. Fairley*, 53 N. Y. 442; *Graham v. Selover*, 59 Barb. 313; *Succession of Voorheis*, 21 La. Ann. 659; *Hunter v. Robertson*, 30 Ga. 479; *Smith v. Coon*, 22 La. Ann. 445; *Marienthal v. Mosler*, 16 Ohio St. 566; *Hance v. Hair*, 25 Ohio St. 349; *Steele v. Souder*, 20 Kans. 39; *Davis v. Clark*, 58 Kans. 454.

The absence from the State of the principal debtor in this case did not suspend the running of the statute in favor of the appellee, his surety. *Bottles v. Miller*, *supra*; *Davis v. Clark*, *supra*; 2 Wood on Limitations, section 246.

It follows that the court did not err in sustaining the demurrer to the reply, and the judgment is therefore affirmed.

COOPER v. BARTLETT ET AL.

[No. 18,490. Filed March 16, 1898.]

From the Henry Circuit Court. *Affirmed*.

James Brown and William A. Brown, for appellant.

Mark E. Forkner and John M. Morris, for appellees.

HACKNEY, J.—This was a suit by the appellant to rescind, for fraud and false representation, a contract under which the appellant purchased from the appellees a certain horse, and, in payment therefor, executed to the appellees his promissory note.

The only question urged for the reversal of the judgment of the circuit court is upon the overruling of appellant's motion for a new trial on the ground of newly discovered evidence. An objection to our entering upon a consideration of the question is made because of the contention that the evidence introduced at the trial is not in the

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165	161

The Ohio Oil Company v. The State.

record. The record discloses the filing, in the office of the clerk of the lower court, on the 19th day of August, 1896, of the longhand manuscript of the evidence and the bill of exceptions containing said manuscript.

It was frequently decided, before the act of March 8, 1897 (Acts 1897, p. 244), that the burden rested upon the appellant to show that the longhand manuscript was filed in the clerk's office before it was incorporated in and filed as a part of the bill of exceptions, and that a showing that the manuscript and the bill were filed on the same day, although the entry of filing first mentioned the filing of the manuscript, was not sufficient. *Hamrick v. Loring*, 147 Ind. 229; *Tate v. Hamlin*, 149 Ind. 94; *Yellow-Hammer, etc., Co. v. Carlin*, 148 Ind. 68; *Citizens' Street R. R. Co. v. Sutton*, 148 Ind. 169. The evidence is not, therefore, properly in the record.

Without the evidence given upon the trial, the evidence claimed as newly discovered cannot be considered, since there is no means of knowing that it is not cumulative, or that the result would probably be changed by it. *Ruddick's Admr. v. Ruddick's Admr.*, 21 Ind. 163; *Sanders v. Loy*, 45 Ind. 229; *Harsh v. Kegley*, 72 Ind. 898. The question urged for reversal not being properly in the record, the judgment of the trial court is affirmed.

THE OHIO OIL COMPANY v. THE STATE.

[No. 18,498. Filed March 16, 1898.]

From the Madison Circuit Court. *Affirmed.*

M. F. Elliott, R. R. Stephenson, George Shirts and W. R. Fertig, for appellant.

W. A. Ketcham, Attorney-General, Daniel W. Scanlan, Merrill Moores, Lovett & Holloway and Blackledge & Shirley, for State.

MCCABE, J.—The appellee sued the appellant to recover certain penalties prescribed by the act concerning natural gas and oil, approved March 4, 1893, (Acts 1893, p. 300). The circuit court overruled a demurrer for want of sufficient facts to both paragraphs of the complaint, and also sustained a like demurrer to an answer of the appellant in a single paragraph in confession and avoidance. And the defendant failing to amend its answer or plead over, and electing to stand on the same, the court rendered judgment in favor of the plaintiff for the penalties sued for, and attorney's fees, on evidence of the value of such attorney's fees.

The same objections are urged against the sufficiency of the complaint, and the same reasons are urged in support of the sufficiency of the answer, involving the constitutionality and proper construction of the act above referred to, that were urged, discussed and de-

Koerner, Auditor, v. State, *ex rel.* Durlauf.

cided in the case of *State v. Ohio Oil Co.*, *ante*, 21. And all the questions here raised were decided against the present appellant in that case. The judgment in this case is therefore affirmed on the authority of that case.

THE LIPPINCOTT GLASS COMPANY v. THE OHIO OIL COMPANY.

[No. 18,463. Filed March 30, 1898.]

From the Madison Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, *Merrill Moores, Blackledge & Shirley, Ferdinand Winter and Chipman, Keltner & Hendee*, for appellant.

Stephenson, Shirts & Fertig and *M. F. Elliott*, for appellee.

MCCABE, J.—This action was brought by the appellant against the appellee to enjoin it from wasting natural gas. The circuit court sustained a demurrer to the complaint for want of sufficient facts to constitute a cause of action. Upon this ruling alone the appellant assigns error.

The complaint is in all material respects exactly like the complaint in the case of *State v. Ohio Oil Co.*, *ante*, 21, except as to the facts showing how the appellant here is injured by the waste of gas. It is shown that it is a manufacturer of glass at Alexandria, where also appellee's oil wells are situate, and that appellant herein is dependent entirely on natural gas for its fuel in its factory, and that by the exhaustion or diminution of the supply of natural gas which appellee's acts are tending to bring about, would destroy the value of all the property of said glass factory, or materially diminish its value. In short, the only practical difference between the complaint in this and the other case above named is that that was by the State, embracing the injury to all the people, while the present action is based on the injury to the appellant alone. The same objections to the sufficiency of the complaint are urged in this case that were urged in that. The ruling in that case is decisive of this. The circuit court, therefore, erred in sustaining the demurrer to the complaint. It results that the judgment must be reversed, and the cause remanded, with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion and the one herein referred to.

KOERNER, AUDITOR, v. STATE, EX REL. DURLAUF.

[No. 18,067. Filed April 1, 1898.]

From the Dubois Circuit Court. *Affirmed.*

Hunter v. The State.

John L. Bretz, John E. McFall and Bruno Buettner, for appellant.
Richard M. Milburn, Michael A. Sweeney and William E. Cox, for appellee.

MCCABE, J.—This was a suit by the appellee against the appellant for a writ of mandate. The object of the appellee in obtaining the writ was to compel the appellant, as auditor of Dubois county, to approve the bond tendered by appellee as secretary of the board of school trustees of the town of Jasper, in said county. The precise questions involved in this case, and every one of them, were decided adversely to appellant in *Koerner v. State, ex rel.*, 148 Ind. 153; on the authority of that case, therefore, the judgment in this case is affirmed.

HUNTER v. THE STATE.

[No. 18,365. Filed April 8, 1898.]

From the Sullivan Circuit Court. *Affirmed.*

John S. Bays, for appellant.

William A. Ketcham, Attorney-General, and *Merrill Moores*, for State.

MCCABE, J.—The appellant was indicted in the court below for robbery. On a trial of the charge by a jury he was found guilty of robbery, as charged in the indictment, and that he was twenty-two years of age. The court adjudged him guilty of robbery, and that he be committed to the custody of the board of managers of the Indiana Reformatory at Jeffersonville, Indiana, as guilty of the crime of robbery, for a term not exceeding fourteen years nor less than two years, subject to the rules and regulations established by said board for said reformatory, and that the defendant's age was twenty-two years.

Error is assigned upon the rulings overruling the motion for a *venire de novo*, and for a new trial. The reasons urged in support of both motions are that the verdict and judgment are both unauthorized by law, unless what is commonly called the "Reformatory Act," approved Feb. 26, 1897, is valid, and that said act is unconstitutional and void.

The same reasons are urged in this case against the constitutionality of the act here in question that were urged in *Miller v. State*, 149 Ind. 607. On the authority of that case, we hold that such reasons cannot prevail, and that the act is constitutional, and that the trial court did not err in overruling the motion for a *venire de novo*, and the motion for a new trial. The judgment is affirmed.

Wilson v. The State.

WILSON v. THE STATE.

[No. 18,262. Filed March 15, 1898. Rehearing denied April 21, 1898.]

From the Elkhart Circuit Court. *Affirmed.**John M. Van Fleet*, for appellant.*William A. Ketcham*, Attorney-General, *M. R. McClaskey* and *C. W. Miller*, for State.

MCCABE, J.—The appellant was prosecuted in the court below on affidavit and information charging him with forgery and obtaining money by false pretenses. On a trial of the issues by a jury, the defendant was found guilty as he stands charged in the information, and that he was of the age of thirty-four years. The circuit court rendered judgment on the verdict, over appellant's motion for a new trial, that the defendant be confined in the State prison for a period of not less than two years nor more than fourteen years on the second count in the information, being the forgery charged therein, and for not less than one year nor more than seven years on the third count, being for obtaining money under false pretenses.

This trial and conviction rest for their validity on what is commonly known as the "Indeterminate Sentence Law," approved March 8, 1897, applicable only to male offenders thirty years of age and over, guilty of felonies other than treason and murder in the first and second degrees. The sole questions presented by the record and assignment of errors are whether said act is constitutional and whether the record shows that the trial court erred in refusing a certain instruction asked by appellant.

As to the constitutionality of the act, the same objections are urged thereto as were urged to the constitutionality of the reformatory act in *Miller v. State*, 149 Ind. 607. The only material difference between the two acts is that the reformatory act applies to cases of male offenders between the ages of sixteen and thirty years who are guilty of a felony, and not guilty of treason or murder in the first or second degree, who are to be sent to the reformatory; while the act now under consideration applies to male persons thirty years of age and over on trial for a felony which is punishable by imprisonment in the State prison, except treason and murder in the first and second degrees, who, on conviction, are to be sent to the State prison. In all other respects, so far as the constitutional question is concerned, the two acts are practically the same. On the authority, therefore, of *Miller v. State*, *supra*, we hold the act now in question not subject to any of the constitutional objections urged against either act, and that the act now under consideration is not unconstitutional, and is valid.

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The Ohio Oil Company v. The State.

There was no error in the refusal of the instruction asked by appellant, as it directed the jury to disregard all evidence in support of certain specifications in the third count in the information, charging the defendant with obtaining money of George Alderman by means of false pretenses, namely, "that the defendant was the vice-president of the Murphy Printing Company, then doing business at No. 734 South State street, Chicago, Illinois; that he the said C. W. Wilson, was then and there in his capacity of vice-president of said Murphy Printing Company, traveling for and representing the said Murphy Printing Company, and taking orders for said Murphy Printing Company." These representations and pretenses are charged to be false, and facts are alleged from which it appears that they were material, furnishing a reasonable ground for relying upon them, and inducing Alderman to part with his money. The judgment is affirmed.

THE OHIO OIL COMPANY v. THE STATE.

[No. 18,600. Filed April 21, 1898.]

From the Madison Circuit Court. *Affirmed.*

M. F. Elliott, R. R. Stephenson, George Shirts, and W. R. Fertig,
for appellant.

William A. Ketcham, Attorney-General, Daniel W. Scanlan, Merrill Moores, Ferdinand Winter, C. C. Shirley, and M. A. Chipman,
for State.

PER CURIAM.—The questions presented by the record in this case were fully considered and decided against the contention of the appellant herein in the case of *State v. Ohio Oil Co.*, ante, 21, and on the authority of the decision in that case the judgment herein is affirmed.

THE OHIO OIL COMPANY v. THE STATE.

[No. 18,601. Filed April 21, 1898.]

From the Madison Circuit Court. *Affirmed.*

M. F. Elliott, R. R. Stephenson, George Shirts and W. R. Fertig,
for appellant.

W. A. Ketcham, Attorney-General, Daniel W. Scanlan, Merrill Moores, Lovett & Holloway and Blackledge & Shirley, for State.

PER CURIAM.—The questions presented by the record in this case are identical with some of the questions considered and decided in the case of *State v. Ohio Oil Co.*, ante, 21, and on the authority of that case the judgment herein is affirmed.

Mason et al. v. The Calumet Canal and Improvement Company.

MASON ET AL. v. THE CALUMET CANAL AND IMPROVEMENT COMPANY.

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[No. 18,097. Filed April 26, 1898.]

From the Porter Circuit Court. *Affirmed.*

Willis C. McMahan, for appellants.

W. O. Johnson, William Johnston and W. P. Fennell, for appellee.

HOWARD, C. J.—This was an action brought by appellee against appellants and others, to quiet title to certain real estate described in the complaint, and situated in S. $\frac{1}{4}$, section 18, and section 19, township 87 N., range 9 W.; and in sections 12, 13, and 24, township 87 N., range 10 W., in Lake county. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States, under the swamp land act of 1850, and by the descriptions of the government survey of 1834. By the same descriptions, the lands were conveyed by the State to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf Lake and the bed of Lake George; but, since the survey the waters have, in large measure, receded, leaving the lake beds comparatively dry land.

In 1875, certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters; and it is through this last survey, and the sales made in pursuance thereof, that appellants claim title. The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean v. Roby*, 145 Ind. 221. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, were wholly invalid, and, consequently, that appellee's title as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.

The second contention is that the action is barred by the fifteen and twenty years' statutes of limitations. This contention is plainly founded upon the same theory as the first, namely, that the appellants obtained some title or took possession of some kind under the void survey of 1875. As to title, as we have seen, there was none. As to possession, the court heard the evidence and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was, on the part of appellants or any of them. Appellee and its grantors continued to pay the taxes

Zeilinski v. The State.

assessed on the lands, by the descriptions in their deeds coming down from the original government survey, and had at all times such possession of and exercised such dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court, in *Worthley v. Burbanks*, 146 Ind. 534, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, a mining claim, a non-navigable lake, a prairie, or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy. The appeal as to Henry B. Mason has been dismissed on his petition, and the contentions made in the brief filed in his behalf need not therefore be considered. Judgment affirmed.

ZEILINSKI v. THE STATE.

[No. 18,591. Filed April 28, 1896.]

From the St. Joseph Circuit Court. *Reversed.**J. E. Talbot and J. W. Talbot*, for appellant.*William A. Ketcham*, Attorney-General, for State.

HACKNEY, J.—The appellant was charged, tried, and convicted of petit larceny and his sentence was to confinement in the Indiana reformatory for a period of not less than one nor more than three years. At the trial, by instructions asked and refused, and by instructions given and excepted to, the question was presented as to whether the appellant's punishment might be by confinement in the county jail, and by fine and disfranchisement, as provided by section 2007, Burns' R. S. 1894.

Evidently the trial court was of the opinion that the act of 1897 establishing the Indiana reformatory, section 8253 (b), *et seq.*, supplement to Burns' R. S. 1894, had the effect to repeal the provision of section 2007, *supra*, as to the punishment for petit larceny where it may appear that the punishment deserved is by confinement in the county jail. In this conclusion the trial court erred.

In the recent case of *Hicks v. State*, ante, 293, this court held that the class of statutes permitting punishment for felonies by imprisonment in the county jail, in lieu of confinement in the State's prison, were not repealed by the indeterminate sentence law, nor by the Indiana reformatory act as to the alternative permitting imprisonment

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Sheets v. Crum *et al.*

in the county jail. This case is directly in point, and discloses the error of the trial court in the case before us. See also *Bealer v. State*, *ante*, 391. The judgment is reversed, with instructions for the return of the prisoner to the sheriff of St. Joseph county, and the direction to the lower court to grant a new trial.

BARNARD v. THE STATE.

[No. 18,606. Filed April 29, 1898.]

From the Hancock Circuit Court. *Reversed.*

Mason & Jackson and *Marsh & Cook*, for appellant.

John F. Wiggins and *R. A. Black*, for State.

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PER CURIAM.—The question in this case is as to the right of one charged with petit larceny to have the jury instructed that it is proper to determine whether the punishment, in the event of a finding of guilt, should be by imprisonment in the county jail, instead of the penitentiary or reformatory.

As held by this court in *Hicks v. State*, *ante*, 293, and *Zeilinski v. State*, *ante*, 700, such right exists, and such instruction should be given. On the authority of these cases, this judgment is reversed, with instructions to the lower court to grant a new trial.

SHEETS v. CRUM ET AL.

[No. 18,412. Filed May 10, 1898.]

From the Clinton Circuit Court. *Affirmed.*

Owen E. Brumbaugh and *Joseph Combs*, for appellant.

Joseph H. Ricketts and *Martin A. Morrison*, for appellees.

JORDAN, J.—Appellant and the appellee, William Crum, were co-sureties for one James H. Sheets, upon certain promissory notes, which appellant was compelled to pay and satisfy as such surety, and he instituted this action to enforce contribution as against William Crum, and also to set aside as fraudulent a certain deed and mortgage as against him and his co-appellees herein, by which the real estate described in the complaint had been conveyed, and subjected to a mortgage lien. On the trial by the court a judgment was rendered in favor of appellant, as against William Crum, for the full amount to which he was entitled upon the issue in respect to contribution, but the decision was in favor of the appellees upon the issue in relation to the alleged fraudulent deed of conveyance and mortgage.

Appellant's motion for a new trial was based upon the grounds :

National Home Building Association v. Huntsinger.

(1) That the decision of the court is not sustained by sufficient evidence; (2) that it is contrary to law; (3) that it is contrary to the evidence. The error assigned in this court is the overruling of this motion. The sole question, therefore, presented for our consideration is: Is there legal evidence in the record sufficient to sustain the decision of the court upon the issue raised by the pleadings in regard to the execution of the alleged fraudulent deed and mortgage?

It is insisted by the appellant that there is no substantial conflict in the evidence, and that it establishes that the appellees were actuated by fraud in the execution of these instruments. Appellant's claim, however, that there is no conflict in the evidence, cannot be sustained. We have carefully read and considered the evidence as it appears in the record; and while, as insisted by counsel for appellant, it may be asserted to be sufficient to have justified the trial court in finding in favor of appellant upon the charge of fraud, imputed to appellees in the execution of the deed and mortgage, still there is sufficient legal evidence in the record, which if deemed credible, may be said to fully sustain the judgment. The learned judge presiding at the trial was in a position to observe the manner in which the witnesses who testified before him conducted themselves in giving their testimony, and must be presumed to have observed all other signs and indications which could be considered as giving an impress of truth or falsehood to their respective statements. He seems to have believed and confided in the evidence given by the appellees which was adverse, in some respects, at least, to that which may be considered as favorable to appellant, and under the circumstances, we cannot weigh the evidence and interpose our judgment against that of the trial judge. We are therefore constrained to yield to the rule of appellate procedure by which this court has been universally controlled, and decline to disturb the result reached below. *Christy v. Holmes*, 57 Ind. 814; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Deal v. State*, 140 Ind. 354. Judgment affirmed.

NATIONAL HOME BUILDING ASSOCIATION v. HUNTSINGER.

[No. 18,491. Filed May 10, 1898.]

From the Madison Circuit Court. *Appeal dismissed.*

Ammon M. Wagner, James Bingham and Jesse R. Long, for appellant.

Jesse Shuman, Mark P. Turner and Austin Retherford, for appellee.

MONKS, J.—This action was brought by appellant against William Huntsinger and Jesse Shuman, and judgment was recovered by said Huntsinger and Shuman against appellant in the court below. From

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George v. The Town of Walkerton.

this judgment appellant appeals, and in his assignment of errors Jesse Shuman is not made a party appellee. The assignment of errors is appellant's complaint in this court, and the only persons over whom this court has jurisdiction are those named in the assignment of errors. *Big Four Building, etc., Assn. v. Olcott*, 146 Ind. 176; *Bozeman v. Cale*, 139 Ind. 187, 190, and cases cited; *Abshire v. Williamson*, 149 Ind. 248; *Michigan Life Ins. Co. v. Frankel*, (Ind. Sup.) 50 N. E. 804; section 655, Thornton's Prac. Code, note 1; Elliott's App. Proc., sections 186, 322.

This cause is not, therefore, in a condition to be determined upon its merits for the reason that this court does not have jurisdiction over all the persons who were parties to the judgment appealed from. *Big Four Building, etc., Assn. v. Olcott, supra*, and cases cited *supra*. The appeal is therefore dismissed.

GEORGE v. THE TOWN OF WALKERTON.

[No. 18,359. Filed May 24, 1898.]

From the St. Joseph Circuit Court. *Reversed*.

Jacob D. Henderson, Stuart MacKibbin and Francis M. Jackson, for appellant.

Walter Funk and A. L. Brick, for appellee.

MONKS, J.—The questions for determination in this case are the same as those decided in *Paul v. Town of Walkerton, ante*, 565. On the authority of that case, the judgment is reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

Howard, J., took no part in the decision of this cause.

BALTIMORE, OHIO AND CHICAGO RAILWAY COMPANY
ET AL. v. THE TOWN OF WALKERTON.

[No. 18,364. Filed May 24, 1898.]

From the St. Joseph Circuit Court. *Reversed*.

J. H. Collins, J. E. Rose, J. H. Rose, J. D. Henderson and Stuart MacKibbin, for appellants.

Walter Funk and A. L. Brick, for appellee.

MONKS, J.—The questions for determination in this case are in all respects the same as those decided in the case of *Paul v. Town of Walkerton, ante*, 565. On the authority of that case, the judgment is reversed, with instructions to sustain appellants' motion for a new trial, and for further proceedings not inconsistent with this opinion.

Howard, J., took no part in the decision of this cause.

INDEX.

ADVERSE POSSESSION—

Survey.—Estoppel.—Quieting Title.—Adverse possession of land, continued for twenty years, passes the title thereof to the occupant, in fee simple, as completely as though he had acquired it from the true owner by conveyance, and the fact that such owner submitted to a survey of such lands will not estop him from asserting title to the land under his claim of adverse possession, irrespective of the survey, when the time for appeal therefrom has not expired.

Wood v. Kuper, 622.

AGREED CASE—When agreed statement of facts made part of record on appeal, see **APPEAL AND ERROR**, 11; *Gates v. Haw, 370.*

ALLEN SUPERIOR COURT—Appeals may be taken to, from a judgment of the board of commissioners establishing a drain. See **COURTS**, 2; *Hockemeyer v. Thompson, 176.*

ANTENUPTIAL CONTRACT.—An adult wife may bar her legal rights in her husband's estate by an agreement entered into before marriage. See **HUSBAND AND WIFE**, 2, 4; *Kennedy v. Kennedy, 636.*

APPEAL AND ERROR—The amendment of the statute pertaining to notice in vacation appeals is invalid. See **STATUTORY CONSTRUCTION**, 7; *O'Mara, Admx., v. Wabash R. R. Co., 648.*

Where error is assigned as a cause for a new trial, that the court erred in giving instructions three and four, such assignment will not be available if one of the instructions is correct.

Cincinnati, etc., R. R. Co. v. Cregor, Admx., 625.

1. *Assignment of Error.*—The appellant must, by proper assignments, specify with reasonable certainty the rulings of the lower court which he desires reviewed; and error, not so assigned, cannot be made available. *Singer, Admr., v. Tormoehlen, 287.*
2. *Assignment of Errors.—New Trial.*—Errors that would form the basis for a new trial cannot be assigned for the first time in the Supreme Court, but should have been assigned in the lower court as reasons for a new trial. *Id.*
3. *Assignment of Error.*—That the court erred in rendering judgment is not a specific assignment of error as contemplated by section 667, Burns' R. S. 1894. *Seisler v. Smith, 88.*
4. *Assignment of Error.—Record.*—Where the record does not contain a demurrer, the overruling of which is alleged as error, it cannot be considered on appeal. *Singer, Admr., v. Tormoehlen, 287.*
5. *Assignment of Error.*—Appellant assigned as error that one John W. Tormoehlen was excluded as a witness. The part of

the transcript cited by appellant's brief as supporting the alleged error, disclosed that one "John Turmail," and not "John W. Tormoehlen" was offered as a witness. *Held*, that the alleged error was not reviewable. *Ib.*

6. *Joint Assignment of Errors.—Husband and Wife.*—Where a husband and wife join in an assignment of errors, the assignment will be good as to both if it is good as to the wife.

Magel v. Milligan, 582.

7. *Bill of Exceptions.*—A bill of exceptions must be signed by the judge before it is filed with the clerk.

Drew v. Town of Geneva, 662.

8. *Evidence When Not in Record.*—The evidence is not in the record where there is no showing that the longhand manuscript of the evidence was ever filed in the clerk's office.

McIntosh v. Zaring, 301.

9. *Bill of Exceptions.—Longhand Manuscript of Evidence.*—The record must affirmatively show that the longhand manuscript of evidence was filed in the clerk's office before it was incorporated in the bill of exceptions.

Marshall v. Seamen, 1; Davis v. Union Trust Co. Admr., 46.

10. *Record.—Bill of Exceptions.—Motion to Strike Out Part of Pleading.*—The question of the correctness of the ruling of the court on a motion to strike out a part of a pleading is not properly presented for review on appeal, where the motion, as incorporated in the bill of exceptions, refers to the matter stricken out as being on certain pages and lines of the original complaint, and the paging and lines thereof were all changed by being incorporated in the record.

State, ex rel. Bishop, v. Crowe, 455.

11. *Bill of Exceptions.—Agreed Statement of Facts.—Evidence.*—A bill of exceptions stated that the cause was submitted to the court on an agreed statement of facts, which statement is recited. Immediately following the statement of facts the bill stated "that the above agreed statement of facts contains all the facts agreed upon, and which were admitted to the court, and all the facts heard or considered by the court in the determination of the cause." *Held*, that the language of the bill of exceptions showed that the agreed statement was all the evidence given in the cause.

Gates v. Haw, 370.

12. *Conclusions of Law.—Exceptions.*—The proper way to save for review the question of the action of the court in overruling a motion to set aside its conclusions of law, is by exception, and bringing such motion into the record by bill of exceptions.

McFadden v. Owens, 213.

13. *Special Bill of Exceptions.—How Made Part of Record.*—A special bill of exceptions must be presented to the trial judge within the time given therefor in order to become a part of the record on appeal. *Ib.*

14. *Exceptions.*—Where exceptions to conclusions of law are joint, no question is presented if either conclusion is correct.

Baker v. Cravens, 199.

15. *Record.—Bill of Exceptions.*—The bill of exceptions controls when there is a contradiction between it and the record.

Blair v. Curry, 99.

16. *How Extrinsic Matters Made Part of Record Without Bill of Exceptions.*—To make matters outside of the record a part there-

of by order of court instead of bill of exceptions, such extrinsic matters must be set out in the order.

Close v. Pittsburgh, etc., R. W. Co., 560.

17. *Transcript.—Must be Authenticated by Signature of Clerk.*—The transcript of the record of the proceedings in the court below must be authenticated by the signature of the clerk of such court.

Watson v. Finch, 183.

18. *Bond on Appeal from Board of Commissioners to Circuit Court.—Presumption.*—The bond to be filed with the county auditor on appeals from the board of county commissioners, as provided by section 7860, Burns' R. S. 1894, is no part of the proceedings of the board, and on appeal of such a cause, from a judgment of the circuit court to the Supreme Court, it will be presumed in the absence of any showing to the contrary that the bond was filed with the auditor and delivered to the clerk as provided by the statute.

Demaree v. Johnson, 419.

19. *Notice.—Vacation Appeal.*—A notice served on the attorney for appellee in a vacation appeal is not sufficient, under section 652, Burns' R. S. 1894, to give the Supreme Court jurisdiction thereof.

O'Mara, Admr., v. Wabash R. R. Co., 648.

20. *Notice.—Dismissal for Failure to Give Sufficient Notice.*—An appeal will be dismissed under rule thirty-six of this court on account of ineffectual notice, where no diligence is shown by appellant to secure proper service after a motion to dismiss for such cause has been filed.

Ib.

21. *Record.—Agreement of Attorneys to Cure Defects.*—An agreement in writing, signed both by the counsel for appellant and appellee, waiving deficiencies in the record, cannot be considered, where such agreement, though copied in the record, is not made a part thereof by order of court or bill of exceptions.

Blair v. Curry, 99.

22. *Record.—Deficiency of, Not Cured by Agreement of Parties.*—All cases in the Supreme Court are heard and determined by the record, and no deficiency in the record can be supplied by the agreement of the parties.

Davis v. Union Trust Co., Admr., 46.

23. *Intervening Errors.*—Where plaintiff appeals, and it is shown by the record that he has no cause of action against the defendant, intervening errors must be considered as harmless, and the judgment affirmed.

Carmel Natural Gas, etc., Co. v. Small, 427.

24. *Evidence.—Objection.*—An objection to the evidence for the reason that it is "incompetent, irrelevant, and immaterial," is too general and indefinite to present any available question.

Mortgage Trust Co. v. Moore, 465.

25. *Failure to Discuss Error Assigned.—Waiver.*—The failure of appellant to discuss an error assigned amounts to a waiver of such error.

Robinson & Co. v. Hathaway, 679.

26. *Trial by Jury.—Waiver.*—A jury trial is waived by failure to demand it at the time of trial; a demand at a previous term of court is insufficient.

Blair v. Curry, 99.

27. *Review.*—The Supreme Court will not review or adjudicate questions unnecessary to the decision of the case.

Carmel Natural Gas, etc., Co. v. Small, 427.

28. *Weight of Evidence.*—In determining on appeal whether the evidence sustains the findings or verdict, only the evidence sustaining the trial court will be considered.

Boyd v. Radabaugh, 394.

29. *Conflicting Evidence.*—In support of a paragraph of complaint

- alleging the existence of a public highway along a certain section line during a certain period, positive evidence as to the existence of such highway was introduced. On the other hand, witnesses for the defense who lived in the neighborhood and were interested in the highways denied the use of a way upon such line, and claimed that the travel had been by devious paths through unenclosed lands, and denied even hearing of or seeing a highway along the line in question. *Held*, that the evidence is conflicting, and cannot be reviewed by the Supreme Court. *Seisler v. Smith*, 88.
80. *Nunc Pro Tunc Order.—Evidence.—Presumption.*—Where no appeal was asked or granted at the close of the trial, and a *nunc pro tunc* entry was made at the succeeding term of court correcting such omission, it will be presumed that the evidence adduced was sufficient to justify the action of the court, where neither the motion for the entry nor the evidence upon which the court acted was made part of the record.
Salem-Bedford Stone Co. v. O'Brien, 656.
81. *Presumption.*—It will be presumed on appeal that the circuit court in all things conformed to and complied with the law.
Close v. Pittsburgh, etc., R. W. Co., 560.
82. *Witness Not Permitted to Testify.—Record.*—Where the record does not disclose that the trial court was informed what was sought to be proved by a witness who was not permitted to testify, there is no available error. *Singer, Admr., v. Tormoehlen*, 287.
83. *Exception to Conclusions of Law Admits Correctness of Findings.—New Trial.*—Exception to conclusions of law is an admission that the facts have been fully and correctly found. The remedy to correct the findings of the court is by motion for new trial.
Blair v. Curry, 99.
84. *When Erroneous Conclusion of Law is Harmless.*—Where one of three conclusions of law in a case is incorrect, the error is harmless if the other two conclusions are correct, and fully justify the judgment of the trial court.
Coburn v. Sands, 141.
85. *General Objections to Judgment.—Review.*—Where on the trial of a criminal cause the defendant makes a general objection to the judgment rendered on the verdict, but does not point out any specific objection thereto, or move to modify the same so as to conform to the verdict, the objection will not be considered on appeal.
Evans v. State, 651.
86. *When Error Not Available.*—In the absence of a specific objection in the trial court from which it may be known that the objection there urged is the same urged on appeal no available error is shown.
Seisler v. Smith, 88.
87. *Special Finding.—When Demurrer to Pleading Available.*—The overruling of a demurrer to a pleading may be considered on appeal, notwithstanding there has been a special finding of facts with conclusions of law thereon, where, to the conclusion of law, no exceptions were taken.
Runner, Assignee, v. Scott, Exr., 441.
88. *Motion to Enlarge General Finding.*—Where there has been no request for a special finding of facts, the court cannot be required to restate and enlarge its general finding so as to make a statement of facts relative to a particular question involved.
Singer, Admr., v. Tormoehlen, 287.
89. *Complaint.—Theory.*—The entire record and briefs of counsel on both sides may be considered on appeal for the purpose of ascertaining the theory of the complaint.
Carmel Natural Gas, etc., Co., v. Small, 427.

40. *Decedents' Estates*.—Where the remedy sought by or against a decedent's estate is not provided by the probate procedure act, but must be enforced under the civil code, an appeal is governed by the civil code, and need not be within forty days, as provided by section 2610, Burns' R. S. 1894. *Roach v. Clark*, 33.

41. *Wills*.—*Probate*.—Appellant cannot complain of a judgment of the court denying his petition to cancel the record probating a will and to be permitted to make due probate thereof, where such judgment was based upon a finding that the will was properly probated. *Baker v. Cravens*, 199.

APPELLATE COURT—

A Court of Last Resort.—*Decisions Not Subject to Review*.—The Appellate Court, in all cases in which it is given jurisdiction, is a court of last resort, and its decisions are not subject to review, whether by appeal or by writ of *certiorari*. *Newman v. Gates*, 59.

ASSIGNMENT FOR BENEFIT OF CREDITORS—When court may appoint receiver for property assigned for benefit of creditors, see *RECEIVERS*, 4; *Goshen Woolen Mills Co. v. City Nat'l Bank of Goshen*, 279.

ATTACHMENT—

1. *Collateral Attack*.—*Mortgage*.—One who takes a mortgage upon property after it has been attached is in no better position to impeach the judgment than the mortgagor.

Runner, Assignee, v. Scott, Exr., 441.

2. *Collateral Attack of Judgment*.—*Presumption*.—Where, in a collateral attack upon the action of a circuit court in ordering property sold which had been taken under a writ of attachment, it is not alleged that the conditions required for the validity of the judgment do not appear of record in the attachment proceedings, it will be presumed that they do appear of record, and that the judgment was authorized. *Ib.*

3. *Appointment of Receiver to Take Charge of Attached Property*.—*No Abandonment of Attachment*.—Where a writ of attachment has been issued against partnership property in a suit against one of the partners, the subsequent appointment of a receiver for the partnership, before judgment is taken, does not work an abandonment of the attachment. *Ib.*

4. *Notice*.—*When Served*.—It is not necessary that notice to the defendant in attachment be served at or before the issuance of the writ. It is enough that it be served before the judgment. *Ib.*

5. *Receiver in Charge of Attached Property*.—*Attachment of Property in Another County*.—*Judgment*.—Where a writ of attachment was issued against partnership property, and the property was subsequently turned over to a receiver of the firm, and another order of attachment is taken out, under which property of one of the partners in another county is taken, and the receiver reports to the court that the amount claimed by plaintiff is due him, and the court orders the attached property of the partner sold, a third party will not be heard to complain of the judgment of the court. *Ib.*

BANKS AND BANKING—

1. *Authority of Cashier to Sell Note*.—*Estoppel*.—Where the cashier of a bank sold a note, and the proceeds were received and retained by the bank, the bank and its receiver are estopped from denying the authority of the cashier to make such sale.

Hawkins, Rec., v. Fourth Nat'l Bank, etc., 117.

2. *Authority of Cashier to Sell Notes.—Presumption.*—Where the facts stated in a special finding show that the cashier of a bank sold a particular note, it will be presumed that the sale was authorized, or was ratified by the board of directors *Ib.*

BILL OF EXCEPTIONS—How special bill is made part of record, see **APPEAL AND ERROR**, 18; *McFadden v. Owens*, 213.

How agreed statement of facts made part of, see **APPEAL AND ERROR**, 11; *Gates v. Haw*, 370.

How motion to strike out part of pleading made part of, see **APPEAL AND ERROR**, 10; *State, ex rel., Bishop, v. Crowe*, 455.

When contradicted by the record, see **APPEAL AND ERROR**, 15; *Blair v. Curry*, 99.

Longhand manuscript must be filed in clerk's office before being incorporated in bill of exceptions. See **APPEAL AND ERROR**, 9; *Marshall v. Seamen*, 1; *Davis v. Union Trust Co., Admr.*, 46.

Must be signed by the judge before it is filed with the clerk. See **APPEAL AND ERROR**, 8; *McIntosh v. Zaring*, 301.

BILLS AND NOTES—Cannot be levied upon unless execution defendant give them up. See **FRAUDULENT CONVEYANCES**, 2; *Vansickle v. Shenk*, 413.

The partial payment of a promissory note by the principal debtor will not suspend the statute of limitations as to the surety. See

LIMITATION OF ACTIONS, 1; *Mozingo v. Ross*, 683.

Collateral Security.—A machine company executed to a bank three notes aggregating \$19,000.00, and secured them by collateral with the privilege of substituting other collateral. The bank desired to sell one of the notes, and in order to escape indorsement, had the machine company to execute a new note payable to itself, and indorse the same in blank to the purchaser. The purchaser of the note took it with knowledge that it had been so executed to avoid indorsement, and with the agreement that it was secured by the collateral notes which were held by the bank. The note was renewed at maturity and made payable to the purchaser. *Held*, that the purchaser of the note could enforce a lien on the notes held by the bank as collateral.

Hawkins, Rec., v. Fourth Nat'l Bank, etc., 117.

BONDS—On appeal from board of commissioners to circuit court, see **APPEAL AND ERROR**, 18; *Demaree v. Johnson*, 419.

CANCELATION OF INSTRUMENTS—See **USURY**.

CITIES—See **MUNICIPAL CORPORATIONS**.

COLLATERAL ATTACK—Where one has been duly elected to the office of township trustee, inducted into office, and acting as such, his title to such office cannot be questioned in a collateral proceeding. *State, ex rel. Bishop, v. Crowe*, 455.

COMMON COUNCIL—The determination of the rights of adverse claimants to office is not a legislative function. See **MUNICIPAL CORPORATIONS**, 1, 2; *Parsons v. Durand*, 203.

COMPLAINT—See **PLEADING**.

The entire record and briefs of counsel on both sides may be con-

- sidered on appeal for the purpose of ascertaining the theory of the complaint. *Carmel Natural Gas, etc., Co. v. Small*, 427.
- A complaint to vacate a judgment rendered on default must state the nature and character of the original suit.
Thompson v. Harlow, 450.
- Sufficiency of, in an action to set aside a settlement for fraud, see PLEADING, 5; *McIntosh v. Zaring*, 301.
- Sufficiency of, in ejectment, see PLEADING, 6; *Nutter v. Hendricks*, 605.
- In action for slander, see LIBEL AND SLANDER, 1; *Winterode v. Renbarger*, 556.
- For injunction, must be good upon the theory on which it proceeds. See INJUNCTION, 2; *Carmel Natural Gas, etc., Co. v. Small*, 427.
- In an action by heirs for a debt due ancestor, see DECEDENTS' ESTATES, 1; *Magel v. Milligan*, 582.
- As to supplemental complaint in action for slander, see PLEADING, 7; *Barker v. Frizer*, 4.
- Is bad which does not state a cause of action as to all the plaintiffs. See PLEADING, 8; *McIntosh v. Zaring*, 301.
- Sufficiency of, in action to cancel mortgage, see USURY, 3; *Baum v. Thoms*, 378.
- In action against railroad company for damages caused by horses becoming frightened at locomotive whistle, see RAILROADS, 6; *Rodgers v. Baltimore, etc., R. W. Co.*, 398.
- Sufficiency of, in action to recover money for benefit of wife, lost by husband at gaming, see GAMING, 4; *Ervin v. State, ex rel.*, 332.
- In an action to set aside a conveyance as fraudulent, see *Van-sickle v. Shenk*, 413.
- CONSIDERATION**—When the consideration in a deed may be shown by parol, see DEEDS; *Lowry v. Downey*, 364.
- CONSTITUTIONAL LAW**—The act of March 8, 1897, making it unlawful to practice medicine without a license, is constitutional. See PHYSICIANS, 1; *State, ex rel., v. Webster*, 607.
- Section 7510, Burns' R. S. 1894, making the waste of natural gas unlawful, is constitutional. See NATURAL GAS, 1; *State v. Ohio Oil Co.*, 21.
- The act of March 8, 1897, commonly known as the "quart shop act," making it unlawful to sell liquors in less quantities than five gallons at a time, is constitutional. See INTOXICATING LIQUORS, 1, 2; *Daniels v. State*, 348.
- CONTINUANCE**—The continuance of a criminal cause beyond the term, to a day within the term of another court in the same judicial circuit is not invalid. See COURTS, 3; *Sutherland v. State*, 154.
- CONTRACTS**—
1. *Joint and Several*.—A written contract by the terms of which three firms of attorneys are to undertake the legal work connected

with the contest of a will, and to receive a stipulated sum, one-third of which is to be paid to each firm, is, in effect, three several contracts.
McIntosh v. Zaring, 301.

2. *Sale.—Forfeiture.*—Where by a contract of sale the purchaser of certain timber is given four years to remove it, such purchaser does not forfeit his right to remove the timber after the expiration of four years, in the absence of a forfeiture clause in the contract.
Halstead v. Jessup, 85.

3. *Joint Contract.—Action by Survivor.*—A contract by the terms of which it is agreed to pay a certain sum of money to two persons, is a joint contract as between such payees, and upon the death of one the right of action vests exclusively in the other.
McIntosh v. Zaring, 301.

CONTRIBUTORY NEGLIGENCE—When not sufficiently shown to bar a recovery for a personal injury, see **MASTER AND SERVANT**; *Salem-Bedford Stone Co. v. O'Brien, 656.*

CORPORATIONS—As to liability of directors for corporate debts, see *Clow v. Brown, 185.*

Failure to Publish Annual Report.—Liability of Directors.—Complaint.—In an action against the directors to recover a debt of the corporation, where the corporation has become insolvent a cause of action is stated in a complaint which alleges the insolvency of the corporation, the failure to publish the annual report, and that the plaintiffs were misled and damaged thereby.
Clow v. Brown, 185.

COURTS—The courts of the State and of the United States are open to the State, both in its sovereign capacity and by virtue of its corporate rights. *State v. Ohio Oil Co., 21.*

1. *Assumption of Jurisdiction.—Presumption.*—Where a court of general jurisdiction assumes the right to issue a writ of attachment, all presumptions will be indulged in favor of the action so taken.
Runner, Assignee, v. Scott, Exr., 441.

2. *Jurisdiction.—Allen Superior Court.—Drains.—Appeals.*—The act creating the Allen Superior Court, and giving it "concurrent jurisdiction with the circuit court in all cases of appeals from * * * boards of county commissioners of city courts in civil cases," etc., authorizes an appeal thereto from a judgment of the board of commissioners establishing a drain.
Hockemeyer v. Thompson, 176.

3. *Continuance Beyond Term.*—Where a criminal trial is in progress on the last day of a term of court, the judge has the power to continue the term until the trial is completed, and to fix a day when the cause is to be renewed; and the fact that the day to which the cause was adjourned was a day when the circuit court of another county in the same judicial circuit would or could be in session, would not render such continuance invalid.
Sutherland v. State, 154.

CRIMINAL LAW—See **RAPE**; **LARCENY**.

1. *Appeal.—Reversal of Judgment.*—Judgments in criminal cases ought not to be reversed for errors which do not materially injure the accused.
Campbell v. State, 74.

2. *Punishment Increased.—Ex Post Facto Law.*—Punishment may be lessened, but it cannot be increased, by a statute enacted after the commission of the offense.
Hicks v. State, 293.

3. *Second Conviction.*—Where a statute imposes a greater punish-

ment upon second or subsequent convictions of an offense, the former conviction must be alleged in the indictment and proved at the trial, or the same can only be punished as a first offense.

Evans v. State, 651.

4. *Bigamy.—When the Crime Does Not Come Within the Purview of Indeterminate Sentence Law.*—The word "punishable" as used in section 1, of the Indeterminate Sentence Law (Acts 1897, p. 219), applies only to those crimes which actually are, and not which may be, punished by confinement in the State prison, and where a person found guilty of bigamy does not, in the opinion of the court or jury trying the case, deserve punishment greater than a fine and imprisonment in the county jail, such case does not come within the purview of the Indeterminate Sentence Law.

Hicks v. State, 293.

5. *Indeterminate Sentence Law.—Constitutionality Of.*—The Reformatory Act, known as the Indeterminate Sentence Law (Acts of 1897, p. 219), is constitutional. Following *Miller v. State*, 149 Ind. 607.

Vancleave v. State, 273.

6. *Larceny.—Verdict.*—*Indeterminate Sentence Law.*—On a prosecution for larceny the jury returned the following verdict: "We the jury find the defendant guilty as charged in the indictment; and we further find that he is thirty-two years of age." *Held*, that the verdict was not defective in not fixing the punishment, as the case came within the provisions of the indeterminate sentence law.

Bealer v. State, 391.

7. *Larceny.—Robbery.—Indictment.*—The defendant may be convicted of larceny, under an indictment charging robbery.

Vancleave v. State, 273.

8. *Larceny.—Cross-Examination of Defendant.—Practice.*—A person on trial for larceny, who becomes a witness in his own behalf, may be asked on cross-examination whether he had not previously been convicted of a similar crime, for the purpose of showing his credibility as a witness. *Ib.*

DAMAGES—Caused by horses becoming frightened from locomotive whistle, see **RAILROADS**, 6; *Rodgers v. Baltimore, etc., R. W. Co.*, 398.

DECEDENTS' ESTATES—See **DESCENT AND DISTRIBUTION**.—

When appeals are not required to be taken within forty days, see **APPEAL AND ERROR**, 40; *Roach v. Clark*, 93.

Competency of widow as witness in action for damages for death of decedent, see **WITNESSES**, 1, 2; *Cincinnati, etc., R. R. Co. v. Cregor*, *Admx.*, 625.

1. *Action by Heirs.—Complaint.*—Where an action is brought by heirs for a debt due an ancestor, it is necessary to allege and prove that the debts of the ancestor have been paid, and the estate settled, or that no letters of administration have been granted.

Magel v. Milligan, 582.

2. *Rights of Surviving Husband.*—Under section 2650, Burns' R. S. 1894, giving a husband all of his wife's estate if it does not exceed \$1000.00, to entitle the husband to claim all the property the burden is on him to show that the amount of the estate does not exceed that sum. *Mortgage Trust Co. v. Moore*, 465.

3. *Widow's Share in Real Estate.—Mortgage.*—Where a widow's interest in the real estate of her deceased husband is sold and conveyed to pay her husband's debts secured by a mortgage thereon,

she is entitled, as against creditors, to be reimbursed for the full value of her share therein out of the personal assets of the estate.

Lewis, Admr., v. Watkins, 108.

4. *Administrator's Sales.—Parties.*—The administratrix of a deceased heir is not a necessary party in a proceeding to sell the ancestor's real estate for the payment of debts of such ancestor, and the failure to make her a party will not entitle her to attack the judgment and sale of the land in a collateral action, as such administratrix, as against the purchaser, where the administratrix was the widow and only heir of the deceased heir, and was made a party to such proceeding as such heir. *Wood, Admr., v. Wood, 600.*
5. *Quieting Title.*—An action by an administrator to set aside a fraudulent conveyance and to quiet title to decedent's real estate, can be sustained only where it is shown that it is necessary to sell such real estate to pay the debts of the estate.
Jarrell, Sheriff, v. Brubaker, Admr., 260.
6. *Judgments.—Sales.—Redemptions.*—The failure of an administrator to redeem lands of his intestate at a judicial sale, and the redemption thereof by one who had no power to redeem will not deprive such administrator of the right to an order to sell such real estate to pay the debts of the estate. *Ib.*
7. *Husband and Wife.—Sale of Wife's Interest in Husband's Real Estate for Payment of Debts of Estate.*—The interest which a widow inherits in the real estate of which her husband dies seized is free from all demands of general creditors, and an order of court to sell such interest to pay the debts of the estate, and the sale thereof are absolute nullities and the purchaser takes no title thereto, where such debts are not secured by mortgage or other lien on the real estate which binds her interest therein.

Lewis, Admr., v. Watkins, 110.

DEDICATION—

1. *Adverse User.—Railroads.—Highways.*—Lands appropriated to one public use are not, in the absence of statutory authority, subject to condemnation for another and inconsistent public use; but since a railroad company may voluntarily part with lands thus held, it may waive such protection, and thereby become estopped from setting up such right after the surrender of lands to the easement of a street or highway from adverse user.
Pittsburgh, etc., R. W. Co. v. Town of Crown Point, 536.
2. *Easement by Prescription.—Highways.—Municipal Corporations.*—The application to cities and towns of the statute, section 6762, Burns' R. S. 1894, providing that a way used for twenty years as a highway shall be deemed a public highway, is not indispensable to the conclusion that ways used as streets for twenty years may become public streets from such use, as, strictly speaking, the doctrine of prescription does not apply to the acquirement of highways, but the user in the case of a street or highway, which, as between individuals, would constitute an easement by prescription, is evidence of a dedication or of a condemnation. *Ib.*
3. *Highways.—Presumption as to Dedication.—Municipal Corporations.*—Where a way connecting two streets of a town has been in use by the public as a highway for thirty years; was ditched and graded by the authorities of the town, and cared for during such time in the same manner as other streets of the town were cared for; was so far regarded by the citizens and property owners as a public street that residences and business houses were constructed on the streets connected by it, without which such streets would have had no outlet at their northern termini, and a livery stable

was maintained near such way for years with its only entrance from such street, such facts raise the presumption of the dedication of such way to the public use. *Ib.*

4. *Highways.—Use by Owner.*—Where the public used a way for travel for thirty years across lands belonging to a railroad company, and graded and cared for the way in the same manner that other streets and highways were cared for, the fact that the railroad company used the way in going to and returning from their depot would not affect the presumption that there was an intention to dedicate the way to the public. *Ib.*
5. *Adverse User.—Disability.—Presumption.—Highways.*—It will be presumed, in the absence of any showing to the contrary, that the owner of lands dedicated to the public as a highway was under no legal disabilities. *Ib.*
6. *Adverse User.—Lease of Lands Dedicated.*—The fact that lands were leased for a term of ninety-nine years, and were out of the possession of the owner, would not bar the acquirement by the public of an easement, by an implied dedication, in such lands for a street. *Ib.*

DEEDS—A lien reserved in a deed conveying real estate is notice to a subsequent mortgagee of the rights of those claiming under such lien. *Warford v. Hankins, 489.*

The title conveyed by a sheriff's deed, executed by virtue of a foreclosure proceeding dates back to the date of the mortgage. See **JUDGMENT, 2; Jarrell, Sheriff, v. Brubaker, Admr., 260.**

When deed and will construed together, see **WILLS, 4; Mortgage Trust Co. v. Moore, 465.**

Consideration.—Where the consideration in a deed is stated in general terms, the true consideration may be shown by parol by either party, for any purpose, except to defeat the operation of the deed as a valid and effective grant, and it may be shown by such evidence that grantee verbally agreed as a part of the consideration to pay an incumbrance existing on the real estate conveyed.

Lowry v. Downey, 364.

DEMURRER—When demurrer to answer should be carried back and sustained to complaint, see **PRACTICE, 8; McIntosh v. Zarling, 301.**

As to form of demurrer to answer, see **PLEADING, 12; Wintrode v. Renbarger, 556.**

DESCENT AND DISTRIBUTION—See **DECEDENTS' ESTATES.**—

When heir of legatee will be bound by mortgage in which she joined with owners of land on which the legacy was a charge, see **MORTGAGES, 6; Mortgage Trust Co. v. Moore, 465.**

DIVORCE—

1. *Property Rights.—Adjudication.*—A decree of divorce by a court having jurisdiction of the parties and the subject-matter constitutes an adjudication between the divorced parties of all property rights or questions growing out of or connected with the marriage. *Walker v. Walker, 317.*
2. *Property Rights.—Breach of Antenuptial Agreement.*—Real estate conveyed by a husband to his wife in pursuance of an antenuptial agreement that in consideration of such conveyance she was to marry him and care for him as long as he should live can-

not be recovered because of a breach of such agreement, after a decree of divorce has been granted. *Ib.*

8. *Marriage. — Capacity of Parties.* — A decree of divorce settles the fact, as between the parties, that they were duly married to each other, and affirms the capacity of each to enter into the contract of marriage. *Ib.*

4. *Allowance to Wife.* — Section 1054, Burns' R. S. 1894, does not provide for any allowance by the court to a wife's attorneys on decreeing to her a divorce, or refusing one to her husband, the allowance must be made to the wife, on her petition.

Garrison v. Garrison, 417.

EJECTMENT — As to sufficiency of complaint, see **PLEADING, 6**; *Nutter v. Hendricks, 605.*

ELECTIONS —

1. *Voting Aid by Township to Railroad. — Notice of Election Essential.* — Under section 5842, Burns' R. S. 1894, providing as to the manner of voting by a township of aid to a railroad company, the giving of notice is essential to the validity of the election.

Demaree v. Johnson, 419.

2. *Public Aid to Railroad. — Notice of Election. — Statute Construed.* — The provision of section 5842, Burns' R. S. 1894, that the sheriff shall post copies of the notice of election in the township where the election is to be held is directory as to the manner of giving notice, the actual giving of notice being the essential requirement. *Ib.*

8. *Public Aid to Railroad. — Bribery.* — An election to determine whether a township will vote aid to a railroad will be vitiated where fraud and bribery were practiced to such an extent as to affect the result. *Ib.*

EQUITY —

1. *When Court May Disregard Verdict of Jury.* — In an equity case it is within the province of the court to disregard the verdict of the jury and enter its own finding. *Seisler v. Smith, 88.*

2. *Action to Compel Production of Sheriff's Certificate, when not Triable by Jury.* — An action by the surviving heirs of the deceased assignee to compel defendant to produce to the sheriff the certificate of a sheriff's sale of real estate, in order that the sheriff might execute a deed thereon to the plaintiffs, is an equitable proceeding, and not triable by jury. *Blair v. Curry, 99.*

ESTATES BY ENTIRETIES — When a wife will be estopped from claiming that a mortgage on real estate held by herself and husband by entireties, was executed to pay her husband's debts, see **HUSBAND AND WIFE, 7**; *Magel v. Milligan, 582.*

ESTOPPEL — Facts creating an estoppel to be available, must be specially pleaded.

Center School Tp. v. State, ex rel. Board, etc., 168.

When a wife will be estopped from claiming that a mortgage on real estate held by herself and husband by entireties was executed to pay her husband's debts, see **HUSBAND AND WIFE, 7**; *Magel v. Milligan, 582.*

When bank is estopped from denying authority of cashier to sell note, see **BANKS AND BANKING, 1**; *Hawkins, Rec., v. Fourth Nat'l Bank, etc., 117.*

EVIDENCE—Objections to evidence for the reason that it is incompetent, irrelevant, and immaterial is too general to present any available question on appeal. See **APPEAL AND ERROR**, 24; *Mortgage Trust Co. v. Moore*, 465.

Of other slanderous words spoken are admissible in an action for slander for the purpose of showing malice. See **LIBEL AND SLANDER**, 3; *Barker v. Prizer*, 4.

Weight of, see **APPEAL AND ERROR**, 28, 29; *Boyd v. Radabaugh*, 394; *Seisler v. Smith*, 88.

Sufficiency of, to show that mortgage was executed to secure money borrowed to pay husband's debts, see **MARRIED WOMEN**, 2; *Boyd v. Radabaugh*, 394.

In determining whether a special finding is sustained by the evidence, the Supreme Court will consider only such evidence as tends to sustain the finding. *Robinson & Co. v. Hathaway*, 679.

1. **Burden of Proof**.—Where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative. *Carmel Natural Gas, etc., Co. v. Small*, 487.

2. **Weight Of.—Action at Law and Suits in Equity**.—The rule of this court against weighing the evidence and passing upon conflicts therein admits of no distinction between actions at law and suits in equity. *Vansickle v. Shenk*, 413.

3. **Omission of Proof Essential to a Recovery.—Appeal**.—Where the party in whose favor judgment was rendered omitted proof essential to a recovery, that fact is no reason for reversal if the adverse party in his evidence supplied the omission.

Collier v. Collier, 276.

4. **When Not in Record.—Bill of Exceptions**.—The evidence is not properly in the record, where it is not shown that the bill of exceptions containing the evidence was filed with the clerk or in open court.

Lowry v. Downey, 364.

5. **Longhand Manuscript.—When Not in Record.—Appeal and Error**.—The longhand manuscript of the evidence is not properly in the record where it is not affirmatively shown that it was presented to the judge within the time allowed for the filing of the bill of exceptions, and before the filing thereof.

McFadden v. Owens, 213.

6. **Longhand Manuscript.—Record.—Certificate of Clerk.—Appeal and Error**.—The manuscript of the evidence is not properly certified to this court where no reference is made thereto in the clerk's certificate, nothing being certified but "a true and correct transcript of all the proceedings."

Ib.

7. **Possession of Note**.—The possession of a note and mortgage securing it is *prima facie* evidence of title in them.

Magel v. Milligan, 582.

8. **Fraudulent Conveyances.—Character of Grantor**.—Evidence as to the reputation of grantor for honesty and fair dealing is not admissible in the trial of an action to set aside a conveyance as fraudulent.

Vansickle v. Shenk, 413.

9. **Fraudulent Conveyances**.—Evidence of dealings and declarations of grantor subsequent to the conveyance, as tending to show fraud upon his part, is admissible as against the grantor in the trial of an action to set aside such conveyance as fraudulent. *Ib.*

EXECUTION—Bills and notes are not subject to execution unless the execution defendant give them up. See FRAUDULENT CONVEYANCES, 2; *Vansickle v. Shenk*, 413.

EXECUTORS AND ADMINISTRATORS—See DECEDENTS' ESTATES.

Administrator of deceased heir is not a necessary party in a proceeding to sell the ancestor's real estate to pay debts of such ancestor. See DECEDENTS' ESTATES, 4; *Wood, Adm'r., v. Wood*, 600.

EX POST FACTO LAWS—Punishment cannot be increased by a statute enacted after the commission of the offense. See CRIMINAL LAW, 2; *Hicks v. State*, 293.

FRAUD—Sufficiency of complaint in action to set aside a settlement for fraud, see PLEADING, 5; *McIntosh v. Zaring*, 301.

A Question of Fact.—Fraud is a question of fact, and when essential to a cause of action or defense thereto, must be found as a fact, and not left to be inferred as a matter of law.

Hawkins, Rec., v. Fourth Nat'l Bank, etc., 117.

FRAUDULENT CONVEYANCES—As to conveyance of real estate in fraud of marital rights. See HUSBAND AND WIFE, 5; *Bookout v. Bookout*, 63.

Evidence as to the reputation of grantor for honesty and fair dealing is not admissible in the trial of an action to set aside a conveyance as fraudulent. *Vansickle v. Shenk*, 413.

Evidence of dealings and declarations of grantor subsequent to the conveyance tending to show fraud upon his part is admissible as against the grantor in the trial of an action to set aside such conveyance as fraudulent. *Ib.*

1. *Action to Set Aside.—Complaint.*—An allegation in a complaint to set aside a conveyance as fraudulent that grantor had not, at the time of the conveyance and suit, property, subject to execution, sufficient to pay plaintiff's judgment amounts to an allegation of insolvency. *Ib.*

2. *Execution.—Proof.—Promissory Notes.*—It is not necessary that plaintiff, in an action to set aside a conveyance as fraudulent, prove a refusal by defendant to turn out notes before he could maintain that the debtor had no property subject to execution, as section 739, Burns' R. S. 1894, makes promissory notes leviable upon condition that the execution defendant give them up, and the burden is upon the debtor to disclose not only ownership, but his willingness to turn them out for levy. *Ib.*

GAMING—

1. *Lost Money.—Recovery.*—Section 6678, Burns' R. S. 1894 (4958, R. S. 1881), providing that money or anything of value lost by betting on any game may be recovered in an action by the State for the benefit of the wife or minor children of the person losing same upon the failure of the person losing the same to institute an action for the recovery thereof as in the preceding section provided, is not in conflict with section 21, article 1, of the State constitution, that "no man's property shall be taken without just compensation," as such property is lost to him by his failure to sue to recover it within six months, as in the statute provided for the recovery thereof. *Ervin v. State, ex rel.*, 332.

2. *Lost Money.—Recovery.—Parties.*—An action for the recovery of money, lost at gaming, for the benefit of the wife of the loser, under the provision of section 6678, Burns' R. S. 1894 (4953, R. S. 1881), may be maintained in the name of the State for the benefit of the wife, notwithstanding the provision of section 251, Burns' R. S. 1894 (251, R. S. 1881), that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section," the next section providing that "an executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted," as the State is within the meaning of the word "person" as used in such last section. *Ib.*
3. *Recovery by State.—When Action Commenced.*—The action provided by section 6678, Burns' R. S. 1894 (4953, R. S. 1881), for the recovery by the State of money lost at gaming for the benefit of the wife of the loser does not accrue until six months thereafter, or until the loser's right of action expires, as provided by the preceding section. *Ib.*
4. *Recovery of Lost Money.—Complaint.—Sufficiency.*—A complaint in an action by the State to recover for the loser's wife money lost at gaming, which avers "that the defendants are * * * indebted to plaintiff for the use and benefit of Nellie A. Walley, the sum of \$6,000.00, * * * lost by William A. Walley to the defendants at gaming by betting and wagering upon the game at cards known as faro, * * * and had and received by the defendants for the use and benefit of one William A. Walley, * * * the husband," etc., sufficiently alleges that the money lost was paid to the defendants within the meaning of the provision of section 6677, Burns' R. S. 1894 (4952, R. S. 1881), that in such action it shall be sufficient for the plaintiff to allege that the defendant has received, for the plaintiff's use the money so lost and paid. *Ib.*
5. *Recovery of Lost Money.—Parties.*—An action to recover for the loser's wife money lost at gaming, must be brought in the name of the State, and the wife is not a proper party plaintiff, and does not become a party plaintiff by being named as relator. *Ib.*
6. *Recovery of Lost Money.—When Money Belonged to Wife of Loser.*—An action cannot be maintained under sections 6676-6678, Burns' R. S. 1894 (4951-4953, R. S. 1881), for the recovery of the wife's money gambled away by her husband without her knowledge or consent, as she would have an action at common law against the winner as a trustee *de son tort* for the recovery thereof. *Ib.*

GUARDIAN AND WARD—

May Maintain Suit to Enjoin Injury to Ward's Estate.—A guardian, in possession of ward's real estate, may maintain a suit in his own name to enjoin injury to his ward's real estate.

Kinsley, Guardian, v. Kinsley, 67.

HARMLESS ERROR—When the overruling of a demurrer to a bad complaint will be harmless, see PRACTICE, 1; *Lourey v. Douney, 364.*

When the overruling of a demurrer to a bad answer is harmless, see PLEADING, 18; *Watson v. Tindall, 488.*

HIGHWAYS—Presumption as to dedication, see DEDICATION, 8, 5; *Pittsburgh, etc., R. W. Co. v. Town of Crown Point, 536.*

Obstructions, abatement of as a nuisance, see *NEW TRIAL*, 4; *Seisler v. Smith*, 88.

By user, see *DEDICATION*, 2; *Pittsburgh, etc., R. W. Co. v. Town of Crown Point*, 536.

Presumption as to Course Of.—It will not be presumed, because an established highway had some portion of its course upon a section line, that it followed the line throughout. *Seisler v. Smith*, 88.

HUSBAND AND WIFE—Widow's share in deceased husband's real estate as against creditors, see *DECEDENT'S ESTATES*, 3, 7; *Lewis, Admr., v. Watkins*, 108.

Burden is on the surviving husband to show that the estate of his deceased wife does not exceed \$1,000.00, where he claims all of such estate. See *DECEDENTS' ESTATES*, 2; *Mortgage Trust Co. v. Moore*, 465.

Release of wife's inchoate interest in lands of her husband, see *REAL ESTATE*; *Sharts v. Holloway*, 403.

Mortgage of wife's real estate to pay husband's debts, see *MARRIED WOMEN*, 2; *Boyd v. Radabaugh*, 394.

When money lost by the husband at gaming may be recovered for the benefit of the wife, see *GAMING*, 1, 2, 3, 4, 5, 6; *Ervtn v. State, ex rel.*, 332.

A conveyance to a husband by his wife's father, as an advancement to her, the transaction being free from fraud, does not create a constructive trust. See *TRUSTS*; *Meredith v. Meredith*, 299.

Where a husband and wife join in an assignment of errors, the assignment will be good as to both if it is good as to the wife. See *APPEAL AND ERROR*, 6; *Magel v. Milligan*, 582.

1. *Marriage a Valuable Consideration.*—Marriage is held to be a valuable consideration, and the wife is regarded as a purchaser of all property which accrues to her by virtue of her marital rights, or by virtue of any antenuptial contract. *Bookout v. Bookout*, 63.

2. *Antenuptial Contract.*—An adult wife may bar her legal rights in her husband's estate by an agreement entered into before marriage to accept other reasonable provisions in lieu thereof. *Kennedy v. Kennedy*, 636.

3. *Marriage Contract. — Construction.*—The court in construing a marriage contract will endeavor so to interpret it as to carry out the true intent of the contracting parties, without regard to the strict technical meaning of words therein employed. *Ib.*

4. *Antenuptial Contract. — Equitable Jointure.*—A contract entered into by a husband and wife, prior to their marriage, in relation to their property rights, is not a settlement or jointure within the meaning of section 2661, Burns' R. S. 1894, which provides that before such settlement or jointure shall constitute a bar to the right or claim of the wife in the lands of her husband, she must give her assent in writing to receive the same in lieu of all right or claim in the lands of her husband. *Ib.*

5. *Conveyance of Real Estate in Fraud of Marital Rights.*—A secret voluntary conveyance by a man of his lands on the eve of his marriage operates as a fraud upon his wife, and cannot serve to defeat her upon his death of her interest in such lands allowed to her under the law as his widow. *Bookout v. Bookout*, 63.

6. *Estates by Entireties.—Presumption.*—Where property is held by entireties, there may be some presumption indulged that the owners are, as they seem to be, equally interested and equally responsible, and that, when they give their joint note and mortgage, they are joint principals. *Magel v. Milligan, 532.*

7. *Estates by Entireties.—Mortgage.—Estoppel.*—Where a husband and wife own real estate by entireties, and, desiring to procure a loan, make an affidavit setting forth that a part of the money to be borrowed is to be used to pay off an incumbrance upon the land, and the balance to purchase other land to be held by entireties, and upon the faith of such affidavit the loan is made, and a mortgage on such real estate accepted as security, the wife will afterwards be estopped from claiming that the mortgage was executed to secure money to pay the husband's debts, and therefore void. *Ib.*

IDEM SONANS—The names "Horrick" and "Horick" used in an information are *idem sonans*, see LARCENY, 2; *Evans v. State, 651.*

IMPEACHMENT—Form of impeaching question, see WITNESSES, 3; *Roller v. Kling, 159.*

INDETERMINATE SENTENCE LAW—Is constitutional. See CRIMINAL LAW, 5; *Vancleave v. State, 273.*

When crime does not come within purview of, see CRIMINAL LAW, 4; *Hicks v. State, 293.*

A verdict in a prosecution for larceny is not defective for failing to fix the punishment. See CRIMINAL LAW, 6; *Bealer v. State, 391.*

INDICTMENT—The defendant may be convicted of larceny under an indictment charging robbery. *Vancleave v. State, 273.*

INFORMATION—Sufficiency of to charge larceny, see LARCENY, 1; *Evans v. State, 651.*

INJUNCTION—The State may enjoin the waste of natural gas. See NATURAL GAS, 3; *State v. Ohio Oil Co., 21.*

In action to enjoin collection of judgment, see SUBROGATION, 3; *Davis v. Schlemmer, Admr., 472.*

An injunction will lie to prevent an abutting property owner from making street improvements in a manner materially different from that provided by ordinance. See MUNICIPAL CORPORATIONS, 9; *Drew v. Town of Geneva, 662.*

1. *Legal Remedy.*—Injunction will not lie where the remedy at law is sufficient and adequate.

Carmel Natural Gas, etc., Co. v. Small, 427.

2. *Complaint.—Must Be Good on the Theory on which It Proceeds.*—Where a complaint for an injunction does not state facts sufficient, as a complaint for an injunction, to constitute a cause of action, it will be held bad on demurrer, even though it states facts enough to be good on some other theory. *Ib.*

3. *Quo Warranto.—Officers.*—Information in the nature of a *quo warranto* is the proper remedy to determine the right to an office, and injunction proceedings, brought by one set of directors of a corporation, to restrain another set from interfering with them in their business will not be sustained, where the sole question to be

- determined by the suit is the legality of the election of the directors assuming to act for the corporation. *Ib.*
4. *Officers.—Title to Office.—Municipal Corporations.*—Injunction is the proper remedy to prevent the intrusion of a claimant to an office occupied by another under claim of right, where the question of title to the office is not involved. *Parsons v. Durand, 203.*
 5. *Action by State.—Demurrer.*—To question the capacity of the State to maintain a suit for injunction, a demurrer should embrace the second statutory ground for demurring, to wit: "That the plaintiff has no legal capacity to sue." *State v. Ohio Oil Co., 21.*
- INSOLVENCY**—An allegation in a complaint to set aside a conveyance as fraudulent, that grantor had not property, subject to execution, sufficient to pay plaintiff's judgment, amounts to an allegation of insolvency. *Vansickle v. Shenk, 413.*
- INSTRUCTIONS**—As to proper instructions where special verdict is to be returned, see SPECIAL VERDICT, 3, 4; *Roller v. Kling, 159.*
- As to presumption of guilt from possession of stolen property. See LARCENY, 4; *Campbell v. State, 74.*
1. *Must Be Applicable to the Evidence.*—An instruction is not only required to state correct legal principles, but it should so state them that the jury may be able to apply them to the particular evidence to which they are germane. *Abbitt, Admx., v. Lake Erie, etc., R. W. Co., 498.*
 2. *Invasion of Province of Jury.*—An instruction given to the jury in the trial of an action against a railroad company for damages for the death of an employe caused by defendant backing a car against another car under which deceased was at work, to the effect that if a red light was on the rear platform of the car under which deceased was at work when injured, and if you find from the evidence that a red light by night is a danger signal, and if defendant's employes knew, or might have known, that such a light, in general railway usage, so placed, was a signal of danger, then such facts made it the duty of such employes to heed it and exercise care and caution, etc., was a usurpation of the functions of the jury, where the evidence was conflicting as to whether the red light on the car at the time of the accident was a signal of danger. *Ib.*
 3. *Witnesses.—Credibility.*—Jurors are not authorized to consider any evidence except such as is given at the trial, but they have the right to test its truth and weight by their general knowledge, derived from experience and observation in their relations with others, and an instruction that in determining the credibility of a witness the jury might call to their aid that knowledge of men and their actions acquired by mingling with men, is proper. *Cincinnati, etc., R. R. Co. v. Cregor, Admx., 625.*
 4. *Appeal.—Presumption.*—In the absence of a showing by the record to the contrary, it will be presumed on appeal that the trial court properly instructed the jury. *Bealer v. State, 391.*
 5. *Erroneous.—When Not Cured.*—Where, in an action to set aside a will on the ground of mental unsoundness of the testator, the proof establishes testator's unsoundness of mind prior to the execution of the will, an erroneous instruction, as to the burden of proof as to a return of sanity at the time of the execution of the will, is not cured by general instructions, as to the burden of proof, which state the law correctly. *Roller v. Kling, 159.*

6. *Criminal Law.—Appeal.*—In criminal cases instructions cannot be brought into the record except by bill of exception.

Bealer v. State, 391.

INSURANCE—Life insurance policies are not subject to taxation.

See **TAXATION, 2**; *State Board of Tax Commissioners v. Holliday, 216.*

INTERROGATORIES TO JURY—Interrogatories calling for evidentiary facts or conclusions of law will be disregarded by the court. See **SPECIAL VERDICT, 2**; *Roller v. Kling, 159.*

Motion to Require Answer.—Where the answer to an interrogatory to the jury was, "Evidence don't show," the action of the court in overruling a motion to require an affirmative or negative answer cannot be questioned on appeal, where no facts are disclosed by the record on which the jury could have answered such interrogatory affirmatively or negatively.

Cincinnati, etc., R. R. Co. v. Cregor, Admr., 625.

INTOXICATING LIQUORS—

1. *"Quart Shop" Law.—No Penalty Provided in Act.—Penalty Prescribed by General Statute.*—The act of March 8, 1897 (Acts 1897, p. 253), commonly known as the "Quart Shop" act, making unlawful the sale of liquors in less quantities than five gallons without a county license, is not rendered ineffective by its failure to prescribe a penalty for its violation, as the penalty is supplied by the general provision of section 2186, Burns' R. S. 1894.

Daniels v. State, 348.

2. *"Quart Shop" Law.—Constitutional Law.*—Section 3 of the act of March 8, 1897, providing that "none of the provisions of the act shall apply to any person engaged in business as a wholesale dealer, who does not sell in less quantities than five gallons at a time," does not discriminate in favor of wholesale dealers, so as to violate section 1, article 14, of the federal constitution. *Ib.*

3. *"Nicholson Law."—License.*—The fact that the situation and condition of the room in which an applicant for a license desires to sell intoxicating liquors is such that the sales of liquor therein would be unlawful, under section 4, of the act of March 12, 1895, providing that the room shall be so arranged that all parts of it can be seen from the street or highway, is not a ground for refusal to grant such license.

Gates v. Haw, 370.

JUDGMENT—A general objection to a judgment in a criminal case will not be considered on appeal. See **APPEAL AND ERROR, 35**; *Evans v. State, 651.*

Sufficiency of motion to modify, see **PRACTICE, 5**; *Baum v. Thoms, 378.*

Where a judgment gives the party obtaining the same greater or less relief than he is entitled to under the verdict or finding, the remedy is by motion to modify.

Jarrell, Sheriff, v. Brubaker, Admr., 260.

When judgment liens will be required to be made from lands other than those covered by a junior mortgage, see **MORTGAGES, 7**; *Bank of Commerce v. First Nat'l Bank, 588.*

1. *Against Part of Plaintiffs or Defendants.—Statute Construed.*—Section 577, Burns' R. S. 1894, providing that "judgments may

be given for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side," is not applicable to a question of pleading, but relates to a question of evidence and the manner of the rendition of judgment in such cases.

McIntosh v. Zaring, 301.

2. *Mortgages. — Foreclosure. — Date of Lien. — Sheriff's Deed.*—The lien of a judgment in foreclosure of a mortgage upon the mortgaged real estate is of the date of the execution of the mortgage, and where the same is sold on said decree, and a sheriff's deed executed therefor, the lien of the certificate of sale, and the title conveyed by such deed, date back to the date of the mortgage.

Jarrell, Sheriff, v. Brubaker, Admr., 260.

3. *Cross-Complaint. — Service.*—Where a complaint to foreclose a mortgage makes junior lienors defendants in such manner as to raise the question of priorities between them, service upon a cross-complaint, filed by one of the defendants, attacking the lien of another defendant is unnecessary. *Thompson v. Harlow, 450.*

4. *Modification. — Review.*—Where there was no objection to the form of a decree, and no motion or other steps taken to modify it, no question thereon is presented for review on appeal.

Heal v. Niagara Oil Co., 483.

5. *Complaint to Vacate.*—A complaint to vacate a judgment rendered on default must state the nature and character of the original suit. *Thompson v. Harlow, 450.*

6. *Setting Aside for Fraud. — Presumption.*—In an action to set aside and vacate a judgment taken by default, it will be presumed in the absence of any showing to the contrary, that the plaintiff procuring such judgment commenced his action in the proper court, in the usual and ordinary way, by filing a complaint, and by serving the proper process on the proper party.

Adams School Tp. v. Irwin, 12.

7. *Action by Township to Set Aside for Fraud.*—Where a judgment against a school township was taken by default, through the connivance of the trustee on whom process was properly served, such judgment will not be vacated at the instance of the township, where it is not shown that the plaintiff procuring the judgment was guilty of any fraud. *Ib.*

8. *Jurisdiction. — Default. — Action to Set Aside.*—A complaint in an action to set aside a default rendered in a foreclosure proceeding, on a cross-complaint by plaintiff's codefendants, which alleges that plaintiff did not appear to such cross-complaint, nor give any one else authority to appear for her, is insufficient, where there is no allegation as to the finding or record of the court on the question of jurisdiction, as a judgment is not void, in the absence of fraud, if the infirmity for which it is attacked does not appear upon the face of the record. *Thompson v. Harlow, 450.*

9. *Complaint to Set Aside Default. — Sufficiency. — Mistake.*—A complaint to set aside a default rendered in a foreclosure proceeding on a cross-complaint by plaintiff's codefendants, which alleges that plaintiff held a judgment against her husband, judgment defendant in such foreclosure proceeding; that she had been advised by friends that her judgment was valid and could not be attacked in the foreclosure suit; that the attorney for plaintiff advised her that he would set up in the complaint said judgment, and show its priority over all other liens except the mortgage; that plaintiff was an aged German lady, unable to read English intelligently, and hardly able to speak or understand the English lan-

guage, and was wholly ignorant of court proceedings; that she employed an attorney to claim her inchoate one-third as against said mortgage, who did so, and then withdrew from the case, when her codefendants filed a cross-complaint, and without notice, and upon default, obtained a judgment thereon declaring her said judgment fraudulent and void, is insufficient, as the only mistake, as shown by the complaint, was one of law, and affords no relief.

Id.

10. *Liens.—Redemption.*—Any judgment creditor whose judgment or decree at the time he offers to redeem shall be a lien on the property sold, junior to that upon which the sale was made, is entitled to redeem real estate sold by a sheriff on execution or decretal order, at any time within one year from the date of sale.

Jarrell, Sheriff, v. Brubaker, Admr., 260.

11. *Assignment.*—To pass the legal title to a judgment by assignment, the clerk of the court, or justice of the peace, must attest such assignment.

Chicago, etc., R. W. Co. v. Higgins, 329.

12. *Equitable Assignment.*—In an action by an equitable assignee of a judgment, the assignor should be made a party defendant to answer as to his interest.

Id.

JUDICIAL NOTICE—Where in the description of real estate the section, township and range are given, the court knows judicially the county in which it is situated. See **MORTGAGES**, 3; *Richardson v. Hedges, 53.*

Pleading.—Not Necessary to Plead Statute.—Courts take judicial cognizance of the statutes of the State, and it is not necessary in an action founded upon a statute to state in the complaint that the action is founded upon a certain statute by referring to it by title and date of passage, when the facts stated are sufficient to enable the court to know that the action was founded upon the statute.

Ervin v. State, ex rel., 332.

JUDICIAL POWER—The State Board of Medical Registration and Examination provided by the act of March 8, 1897, is not a judicial body. See **PHYSICIANS**, 5; *State, ex rel., v. Webster, 607.*

JUDICIAL SALE—Sale by sheriff of wrong tract of real estate, see *Allen v. Adams, 409.*

JURY—When right to trial by jury is waived, see **APPEAL AND ERROR**, 26; *Blair v. Curry, 99.*

JUSTICE OF THE PEACE—

1. *Transcript of Judgment.—Certificate.*—The certificate to a justice's transcript was as follows: "I hereby certify that the above and foregoing is a true and correct copy, as appears of record on my docket, together with the costs taxed at," etc. *Held*, that the certificate was sufficient.

Collier v. Collier, 276.

2. *Pleading Judgment Of.—Jurisdiction.*—Under the provision of section 872, Burns' R. S. 1894 (369, R. S. 1881), that in pleading a judgment of a court of special jurisdiction it shall be sufficient to allege generally that judgment was duly given or made, it is not necessary to allege the facts conferring jurisdiction, provided it is alleged that judgment was duly given or made.

Chicago, etc., R. W. Co. v. Higgins, 329.

LANDLORD AND TENANT—

Lease by Married Woman.—*Natural Gas and Oil Lease.*—A lease by

a married woman of her lands to a gas and oil company for the purpose of operating thereon gas and oil wells is not an encumbrance or conveyance thereof within the meaning of section 6961, Burns' R. S. 1894, prohibiting a married woman from encumbering or conveying her lands without her husband joining in the execution thereof. *Heal v. Niagara Oil Co.*, 483.

LARCENY—Defendant may be convicted of larceny under an indictment charging robbery. *Vancleave v. State*, 273.

1. *Information*.—An information charging one E with the larceny of certain described property, "such property then and there being the personal goods and chattels of one H," sufficiently charges that the property stolen was the property of H. *Evans v. State*, 651.
2. *Information*.—*Idem Sonans*.—An information for larceny is not rendered bad by reason of the fact that the affidavit gives the name of the person from whom the property was stolen as "Horrick," and the information as "Horick," the names being *idem sonans*. *Ib.*
3. *Information*.—*Verdict*.—*Harmless Error*.—Where an affidavit and information charges larceny, but does not charge a former conviction, a verdict finding the defendant "guilty of grand larceny as charged in the information," will be construed as a conviction for petit larceny, and an error of the court instructing the jury as to grand larceny, is harmless. *Ib.*
4. *Possession of Stolen Property*.—*Presumption*.—*Instruction*.—On a prosecution for larceny the court instructed the jury that the exclusive possession, by defendant, of the stolen property, soon after the larceny, if not satisfactorily explained, raises a "presumption of law" that defendant is guilty. *Held*, that the instruction was technically incorrect, in that the presumption raised was a presumption of fact, and not of law, but that the error was harmless, where other instructions given showed that the court meant a disputable, and not a conclusive, presumption. *Campbell v. State*, 74.
5. *Possession of Stolen Property*.—*Presumption*.—*When Duty of Jury to Convict*.—Where, on a prosecution for larceny, the evidence established beyond a reasonable doubt that the stolen goods were found in the exclusive possession of the defendant who failed to account for such possession so as to show that it was an honest one, or gave a false account thereof, and there was no other evidence or proof of countervailing circumstances, the jury were legally bound to find defendant guilty, although the presumption upon which the jury found such guilt was technically a presumption of fact and not one of law. *Ib.*
6. *Second Conviction*.—*Verdict*.—Where an indictment for petit larceny charges a former conviction for a like offense, and the jury return a verdict of guilty as charged, the defendant is found guilty of petit larceny, but is subject to the punishment prescribed for grand larceny. *Evans v. State*, 651.

LEASE—A natural gas and oil lease of a married woman's land may be executed by such married woman without her husband joining therein. See **LANDLORD AND TENANT**; *Heal v. Niagara Oil Co.*, 483.

LIBEL AND SLANDER—

1. *Complaint*.—*Neglect of Official Duty*.—Words, charging that a sheriff neglected, mistreated, and starved prisoners in his custody, impute the commission of a crime, and are slanderous. *Wintrode v. Renbarger*, 556.

2. *Justification. — Rule as to Evidence.* — Prior to the act of March 4, 1897 (Acts 1897, p. 187), it was necessary that a plea justifying the speaking of words imputing the commission of a crime be supported by evidence establishing its truth beyond a reasonable doubt. *Ib.*

8. *Evidence of Other Slandorous Words.—Malice.*—In an action for slander, evidence of other similar words spoken at other times and places, whether spoken prior or subsequent to the beginning of the action, are admissible to show that the words charged in the complaint were spoken with malice. *Barker v. Prizer, 4.*

LICENSE—Of practicing physician, see **PHYSICIANS**, 1, 2, 3, 4; *State, ex rel., v. Webster, 607.*

LIENS—A mechanic's lien for the construction of a house has precedence, as to the building, over a mortgage given to secure money for the construction of the house. See **MECHANIC'S LIEN**; *Building and Loan Ass'n v. Coburn, 684.*

A claim for the payment of land condemned by a railroad company is superior to any lien afterward placed upon the land. See **RAILROADS**, 4; *Coburn v. Sands, 141.*

The lien of a judgment in foreclosure of a mortgage is of the date of the mortgage. See **JUDGMENT**, 2; *Jarrell, Sheriff, v. Brubaker, Adm'r., 260.*

1. *Priority. — Redemption. — Estoppel.* — The acceptance by the holder of a sheriff's certificate of sale of redemption money from another lien holder in satisfaction of his judgment will not estop the administrator of the deceased owner of the real estate from asserting that the redemptioner's lien was senior to the judgment upon which the sale was made from which it was sought to redeem. *Ib.*

2. *Redemption. — Venditioni Exponas.* — Under section 785, Burns' R. S. 1894 (778, Horner's R. S. 1897), concerning the redemption of real estate sold on execution or decretal order, only a judgment creditor, his executors, administrators or assigns, whose judgment or decree at the time he offers to redeem is a lien on the property sold junior to that upon which the sale was made, is entitled to sue out an execution in the nature of a *venditioni exponas* upon the judgment on which the sale was had, and from which the redemption is made. *Ib.*

LIMITATION OF ACTIONS—

1. *Partial Payment.*—The partial payment of a promissory note by the principal debtor will not suspend the statute of limitations as to the surety. *Mozingo v. Ross, 688.*

2. *Principal and Surety. — Bills and Notes. — Absence of Principal from State.*—The absence of the principal debtor of a promissory note from the State will not suspend the statute of limitations as to the surety. *Ib.*

MARRIED WOMEN—See HUSBAND AND WIFE.

A married woman may lease her lands to a company for the purpose of operating thereon gas and oil wells. See **LANDLORD AND TENANT**; *Heal v. Niagara Oil Co., 483.*

1. *Suretyship.—Answer.*—In an action against a husband and wife to foreclose a mortgage on the wife's separate property, an answer by the wife that the note and mortgage sued on were

executed "to secure the debts of her husband, and for no other purpose or consideration, and that she did not receive any of the consideration of said note, nor was the same or any part of it paid to her or used for her benefit or the improvement of her separate property" is a sufficient answer of suretyship.

Boyd v. Radabaugh, 394.

2. *Suretyship.—Evidence.*—In an action against a husband and wife to foreclose a mortgage on the wife's separate property, the evidence showed that the note and mortgage were executed for money borrowed by the husband to pay his own debts, which fact was known to the mortgagee; but that the money was paid to the wife by check. *Held*, that the evidence was sufficient to sustain the finding that the wife executed the note and mortgage as surety.

Ib.

MARSHALING ASSETS AND SECURITIES—Where at the time of the acceptance of a mortgage it is apparent that certain prior judgment liens can be paid from other lands covered by them, the right to require such payment will continue and be protected as against such judgment liens.

Bank of Commerce v. First Nat'l Bank, 588.

MASTER AND SERVANT—

Personal Injuries.—Contributory Negligence.—Where an employe engaged in handling heavy stone by means of a traveler and other machinery on an elevated track, under the direction of a superintendent, and while going to the ground, as required, stepped upon a shaft which revolved by reason of a sudden gust of wind striking the traveler, and his ankle was drawn into the bevel gearing thereof and injured, he was not guilty of such negligence as to bar a recovery for such injury, where it was shown that he was a common laborer and employed as such, and that it was the custom to chock or brace the wheels of the traveler when it was at rest, and that plaintiff had reason to believe that it was chocked at the time, and could not have discovered that it was not chocked without making close inspection thereof.

Salem-Bedford Stone Co. v. O'Brien, 656.

MECHANIC'S LIEN—

Mortgages.—Priority.—Under the provision of section 7256, Burns' R. S. 1894, that the lien of a mechanic attaches to the building and to the interest of the owners in the lot or land, and, where "the land is encumbered by mortgage, the lien, so far as concerns the buildings erected by said lien holder, is not impaired by * * * foreclosure of the mortgage, but the same may be sold to satisfy the lien," etc., the holder of a mechanic's lien has precedence, as to the building itself, over a mortgage, executed on the lot, prior to the construction of the building thereon, although the money for which the mortgage was executed was expended in the construction of such building. *Building and Loan Ass'n v. Coburn, 684.*

MONUMENT—See SOLDIERS' MONUMENT.

MORTGAGES—A mortgage given to secure money for the construction of a building is junior to the lien of a mechanic afterward acquired for the construction thereof. See **MECHANIC'S LIEN**; *Building and Loan Ass'n v. Coburn, 684.*

1. *To Secure Preexisting Debt.*—A mortgage given to secure a pre-existing debt will not cut off prior equities.

Warford v. Hankins, 489.

2. *School Fund.—Sufficiency of Notice of Sale by Auditor.*—A notice, under section 5820, Burns' R. S. 1894, of the sale of land mortgaged to secure a loan from the common school fund, describing the indebtedness as due the "common and congressional school funds," is sufficient, although the "common school fund" and the "congressional" are two separate and distinct funds.

Richardson v. Hedges, 53.

3. *School Fund Mortgage.—Description of Real Estate.—Judicial Notice.*—The real estate exposed for sale by a county auditor, to satisfy a school fund mortgage, is presumed to be in this State, and where such real estate is described by metes and bounds, and the section, township, and range are given, the court knows judicially in which county it is situated. *Id.*

4. *School Fund Mortgage.—Notice of Sale.*—Where a county auditor, upon the sale of real estate to satisfy a number of school fund mortgages, exposes for sale the separate tracts of real estate so mortgaged, it is sufficient notice, under section 5820, Burns' R. S. 1894, to include all the tracts of land in one notice. *Id.*

5. *School Fund Mortgage.—Notice of Sale.*—A notice of the sale of land to satisfy a school fund mortgage, which notice properly describes the land by metes and bounds, is sufficient, though it erroneously states that the land was conveyed by a certain deed. *Id.*

6. *Mother's Interest as Heir of Daughter.*—A father bequeathed to his daughter a legacy and made it a charge upon certain real estate. Before the legacy was paid the daughter died, without children, her mother and her husband surviving her. Subsequently the mother joined the owner of the real estate in a mortgage thereof. *Held*, in an action to foreclose the mortgage, that the mortgage and foreclosure carried the mother's one-fourth interest in the legacy which she inherited from her daughter, under section 2650, Burns' R. S. 1894. *Mortgage Trust Co. v. Moore, 465.*

7. *Judgment Liens.—Priority.—Marshaling Assets.*—Where a creditor takes a mortgage on land, it then being apparent that certain prior judgment liens can be fully paid from other land covered by such liens, the right to require such payment will continue and be protected as against such judgment liens.

Bank of Commerce v. First Nat'l Bank, 583.

MUNICIPAL CORPORATIONS—The proper use of a street for a telephone system is not an additional servitude for which the abutting property owner is entitled to compensation. See *TELEPHONE, 1; Magee v. Overshiner, 127.*

When a traveled way becomes a public street by user, see *DEDICATION, 2, 8; Pittsburgh, etc., R. W. Co. v. Town of Crown Point, 536.*

1. *Common Council.—When Acts are Not Legislative.*—A proceeding by a common council of a city whereby the legal rights of adverse claimants to an office were decided and the incumbent ejected is not a legislative function. *Parsons v. Durand, 203.*
2. *Common Council.—When Acts Not Legislative.*—The determination of the legal rights of adverse claimants to an office and the ejection of the incumbent thereof are not legislative functions of a city council, but are acts within the province of the judiciary. *Id.*
3. *Proceedings to Open and Extend Street.—Jurisdiction.—Appeal to Circuit Court—Statute Construed.*—By proceedings, under sec-

tion 3681, Burns' R. S. 1894, a city ordered the opening and extension of a certain street. An appeal to the circuit court was taken by property owners in accordance with the provisions of section 3643, Burns' R. S. 1894; and the property owners desiring to question the jurisdiction of the common council and the city commissioners to open the street, demurred to the complaint "on the ground that the court had no jurisdiction." *Held*, that, as the want of jurisdiction was not apparent on the face of the complaint (the transcript), the demurrer was properly overruled.

Powell v. City of Greensburg, 148.

4. *Proceedings to Open and Extend Street.—Appeal to Circuit Court.—Defense.*—On appeal to circuit court from an order of the common council of a city to open and extend a street, an objection that the city commissioners omitted to include and assess in their report property belonging to persons other than appellants will not be considered. *Ib.*

5. *Annexation of Contiguous Territory.—Notice of Petition.*—A notice of the petition of a common council to annex contiguous territory, under section 3659, Burns' R. S. 1894, need not give the names of the owners of the land in addition to the description thereof, and where incorrect names of the landowners are included in the notice, they will be rejected as surplusage without impairing the sufficiency or validity of the notice. *Ib.*

6. *Annexation of Territory.—Petition.—Sufficiency.*—A petition for the annexation of territory to a town, which shows that many persons in the territory sought to be annexed have been receiving the benefits and advantages of the town, without bearing their share of its burdens, and that public interests require that said territory be annexed, and that it is just and equitable, and for the public good, that said petition be granted is sufficient.

Paul v. Town of Walkerton, 565.

7. *Annexation of Territory.—Appeal.—Trial De Novo.—Doctrine of Practical Construction.—Stare Decisis.*—The provision of section 4226, Burns' R. S. 1894, that an appeal from the board of county commissioners in a proceeding for the annexation of contiguous territory to a city or town shall be tried *de novo*, is constitutional, under the doctrine of practical construction and the rule of *stare decisis*. *Ib.*

8. *Improvement of Streets.—Authority of Board of Trustees of Town.*—The board of trustees of an incorporated town is invested with plenary powers and exclusive jurisdiction over the streets and the improvement and repair thereof. *Drew v. Town of Geneva, 662.*

9. *Improvement of Sidewalk in Manner Different from that Provided by Ordinance.—Injunction.*—An incorporated town, having by ordinance provided for the improvement of a sidewalk according to certain plans and specifications, may enjoin an abutting property owner from making the improvement in a manner materially different from that provided by the ordinance. *Ib.*

10. *Condemnation of Railroad Right of Way for Street.*—Land used by a railroad company for the use of its road may be appropriated by a city for street purposes. *Powell v. City of Greensburg, 148.*

NATURAL GAS—A married woman may lease her land for natural gas without her husband joining in the execution. See **LANDLORD AND TENANT**; *Heal v. Niagara Oil Co., 483.*

1. *Waste Of.—Constitutional Law.*—Section 7510, Burns' R. S. 1894, providing that it shall be unlawful for any person, firm, or corporation operating a natural gas or oil well to permit the

flow of gas or oil from such well to escape into the open air, is not unconstitutional as an unwarranted interference with private property, as the title to such gas or oil does not vest in any private owner until it is reduced to actual possession.

State v. Ohio Oil Co., 21.

2. *Waste Of.—Statute Construed.*—Section 7510, Burns' R. S. 1894, making it unlawful "to permit the flow of gas or oil from any such well into the open air," applies to the waste of gas from wells producing both gas and oil. *Ib.*
3. *Waste Of.—Nuisance.—Injunction.*—In a suit by the State to enjoin an oil company from wasting natural gas, the complaint alleged that a large number of the people of the State were almost wholly dependent upon such gas for fuel supply; that the State relying upon the permanent supply of gas, had equipped many public buildings and institutions for the use of natural gas as fuel; that defendant, in the operation of certain wells producing both gas and oil, has permitted large quantities of gas to escape and become wasted, and avows its purpose to continue so to permit the escape of such gas; that the statutory penalties for the wasting of gas are wholly inadequate, and that the wrongful and unlawful conduct of defendant, if suffered to continue, will be irreparable. *Held*, that the facts stated in the complaint make a case of public nuisance which the State has a right to have abated by injunction. *Ib.*

NEGLIGENCE—The sounding of a locomotive whistle at a place of extraordinary danger is not negligence *per se*. See **RAILROADS**, 7; *Rodgers v. Baltimore, etc., R. W. Co.*, 398.

Co-employe.—Imputed Negligence.—Contributory Negligence.—Where two persons are associated together as car inspectors, and by an arrangement or agreement between them, either express or implied, it became the duty of one while the other was under a car engaged in the inspection and repair thereof, to look out, and give notice to the other of approaching danger, the relation of principal and agent exists between them in this respect, and if the former fails to perform such duty, and by reason of his neglect his co-employe is injured by an approaching train, such negligence is imputable to the latter, and in order that a recovery can be had for such injury it is incumbent upon plaintiff to show freedom from contributory negligence on the part of his co-employe.

Abbitt, Admr., v. Lake Erie, etc., R. W. Co., 498.

NEW TRIAL—The remedy to correct the findings of the court is by motion for new trial. See **APPEAL AND ERROR**, 33; *Blair v. Curry*, 99.

1. *Time of Filing Motion.—Statute Construed.*—Where a finding of the circuit court was made on the 29th day of the November term, 1895, on December 28th of that year, and judgment not rendered till December 7, 1896, being the 13th day of the November term, 1896, three terms of court having intervened between the finding and the entering of judgment, a motion for a new trial on January 29, 1897, is too late. *Allen v. Adams*, 409.
2. *When Judgment Rendered on Last Day of Term.*—Where judgment is rendered on the last day of the term of court, and a motion for a new trial is not made till the first day of the next regular term, a special term of the court having been held in the meantime, the motion for a new trial is too late. *McIntosh v. Zaring*, 301.

8. *Quieting Title.—Joinder of Causes of Action.—New Trial as of Right.*—Where a paragraph of complaint for the possession of real estate, or to quiet the title thereto, is joined in the same complaint with one for any other cause of action, a new trial as of right, under section 1077, Burns' R. S. 1894, is not permitted.

Nutter v. Hendricks, 605.

4. *Obstructions of Highway.—Action to Abate as a Nuisance.*—Under section 1076, Burns' R. S. 1894, granting a new trial as of right in actions to quiet title to real estate, a new trial as of right cannot be had where the obstruction of a public highway is sought to be abated as a nuisance, further maintenance enjoined, and damages claimed.

Seisler v. Smith, 88.

5. *Joint Assignment of Error.—Instructions.—Appeal and Error.*—Where error is assigned as a cause for a new trial that the court erred in giving instructions three and four, such assignment will not be available if one of the instructions is correct.

Cincinnati, etc., R. R. Co. v. Cregor, Adm., 625.

6. *Special Verdict.—Motions for Judgment.—Review.*—Overruling or sustaining motions for judgment on a special verdict is not a cause for a new trial. The correctness of the rulings on such motions can only be presented by assigning such rulings as error in this court.

Ib.

NOTICE—Served on attorney for appellee in vacation appeal is not sufficient. See **APPEAL AND ERROR**, 19; *O'Mara, Adm., v. Wabash R. R. Co., 648.*

Sufficiency of in tax sales, see **TAXATION**, 4; *Newton v. Roper, 630.*

Of a petition to annex contiguous territory to a city, see **MUNICIPAL CORPORATIONS**, 5; *Powell v. City of Greensburg, 148.*

Of sale of land mortgaged to school fund, see **MORTGAGES**, 2, 4; *Richardson v. Hedges, 53.*

Of election to vote aid to railroad, see **ELECTIONS**, 1, 2; *Demaree v. Johnson, 419.*

A lien reserved in a deed of conveyance constitutes notice thereof to a subsequent mortgagee. See **VENDOR'S LIEN**, 1; *Warford v. Hankins, 439.*

NUISANCE—The waste of natural gas in the operation of oil wells may become a nuisance that the State may abate by injunction. See **NATURAL GAS**, 3; *State v. Ohio Oil Co., 21.*

NUNC PRO TUNC ENTRY—When it will be presumed that the evidence was sufficient to justify the action of the court in making the order, see **APPEAL AND ERROR**, 30; *Salem-Bedford Stone Co. v. O'Brien, 666.*

OFFICERS—When injunction is the proper remedy to prevent the intrusion of a claimant to an office, see **INJUNCTION**, 4; *Parsons v. Durand, 203.*

When *quo warranto* is the proper remedy to determine the right to an office, see **INJUNCTION**, 3; *Ib.*

1. *Eligibility.—Pleading.*—An allegation in a complaint in a *quo warranto* proceeding to remove defendant from office which alleges that relator was eligible to such office is sufficient without setting out his qualifications as required by the constitution.

State, ex rel. Bishop, v. Crowe, 455.

2. *Removal.—Acceptance of Incompatible Office.*—A judgment declaring the office of township trustee vacant on account of the incumbent thereof having been appointed and having accepted the office of postmaster would not affect the validity of an election of county superintendent participated in by such trustee after the acceptance of such office and before the rendition of the judgment of ouster. *Ib.*
3. *Township Trustee.—Collateral Attack.*—Where one has been duly elected to the office of township trustee, inducted into office, and acting as such, his title to such office cannot be questioned in a collateral proceeding. *Ib.*

OVERRULED CASES—When township has not vested right in funds appropriated to use of township under construction placed upon the law by the Supreme Court, see *TOWNSHIP TRUSTEE, 1; Center School Tp. v. State, ex rel., 163.*

1. *Last Decision the Law.*—A decision of a court of last resort is but an exposition of what the court construes the law to be, and in overruling a former decision the court does not declare the overruled decision to be bad law, but that it never was the law, and the court was simply mistaken in regard to the law in its former decision; the first decision is wholly obliterated, and the law as therein declared must be considered as though it never existed, and that the law always has been as expounded by the last decision. *Ib.*
2. *Vested Rights.*—Courts will not apply a change made in the construction of the law, as it was held to be in the overruled case, so as to invade vested rights. *Ib.*

PARENT AND CHILD—

1. *Emancipation of Child.*—A child may be released from parental control, by the consent of the parents, or by abandonment and failure of the parents to support the child, and when thus released, the child becomes entitled to his earnings, and liable for his necessary support. *Robinson & Co. v. Hathaway, 679.*
2. *Support of Child.*—Evidence showing that a boy eleven years of age, his mother being dead, was placed by his father with a woman, with the request that she care for him until the father was settled again; that shortly thereafter the boy inherited an estate from his grandmother, which, when he arrived at twenty-one years of age amounted to \$1,400.00; that no agreement was made with the father to keep the boy, and no pay was demanded of him; that the father married again, but never called for the child, shows an indebtedness on the part of the boy sufficient to support a consideration in a deed of conveyance executed by the boy, in payment for his support, of real estate worth \$1,700.00, subject to a mortgage of \$800.00, where it was further shown that the boy was supported and cared for until he was twenty-one years of age, and during such time was sent to school and performed no services of any value, and the only compensation received for such support was the real estate conveyed. *Ib.*

PARTIES—An action to recover for the loser's wife money lost at gaming must be brought in the name of the State. See *GAMING, 5; Ervin v. State, ex rel., 332.*

PARTNERSHIP—A partnership is not alleged in a complaint by merely setting out a contract which had been signed by two of the plaintiffs in their firm name. *McIntosh v. Zaring, 301.*

Right of Survivor Upon Death of Partner.—The right of action to collect the debts and assets due to a partnership where any of the partners are dead is vested by law exclusively in the surviving partner or partners. *Ib.*

PERSONAL INJURIES—Of person engaged in handling stone, see *MASTER AND SERVANT; Salem-Bedford Stone Co. v. O'Brien, 656.*

PHYSICIANS—

1. *License.—Constitutional Law.—Police Power.*—The act of March 8, 1897, making it unlawful to practice medicine without a license, and denying to all physicians in the State, lawfully engaged in the practice, the right to continue such practice, until they conform to the requirements of the statute, and restricting the practice of medicine to persons who are able to demonstrate their qualifications to the State Board of Medical Registration and Examination created by the act, is constitutional, being a proper exercise of the police power of the State. *State, ex rel., v. Webster, 607.*
2. *License.—Evidence.—Statute Construed.*—Under sections 2 and 5 of the act of March 8, 1897, providing the manner in which a physician holding a license to practice medicine under the preceding law may procure a new license and continue in the practice, the former license is only *prima facie* evidence of the right to a new one. *Ib.*
3. *License.—Revocation.—Notice.*—The act of March 8, 1897, to regulate the practice of medicine, revokes by implication all former licenses held by physicians, and one who applies for a new license takes notice of whatever action the board may take thereon. *Ib.*
4. *License.—Revocation.*—The provisions of section 5 of the act of March 8, 1897, that a physician guilty of certain misconduct may have his license revoked by the State Board of Medical Registration and Examination, has no application to licenses issued under a former act to regulate the practice of medicine. *Ib.*
5. *Board of Registration and Examination Not a Judicial Body.*—The State Board of Medical Registration and Examination, which, under the act of March 8, 1897, passes upon the qualifications of applicants for licenses to practice medicine, is not a judicial body, though the statute provides for an appeal from the decision of such board. *Ib.*

PLEADING—Sufficiency of answer by married woman alleging suretyship, see *MARRIED WOMEN, 1; Boyd v. Radabaugh, 394.*

In pleading a judgment of a court of special jurisdiction it is not necessary to allege the facts conferring jurisdiction, where it is alleged generally that judgment was duly rendered. See *JUSTICE OF THE PEACE, 2; Chicago, etc., R. W. Co. v. Higgins, 329.*

When not necessary to plead statute in action founded upon statute, see *JUDICIAL NOTICE; Ervin v. State, ex rel., 332.*

1. *Complaint.—Allegation of Partnership.*—A partnership is not alleged in a complaint by merely setting out a contract which had been signed by two of the plaintiffs in their firm name. *McIntosh v. Zaring, 301.*
2. *Defective Complaint.—Answer.—Practice.*—Where the grounds for demurrer do not appear on the face of the complaint, and defendant files answer, as provided by section 846, Burns' R. S. 1894, and issue is joined, and the proof establishes the truth of the

answer, the complaint will be defeated in the same manner as if the facts of the answer appeared in the complaint, and a demurrer had been sustained to it. *Ib.*

3. *Complaint Not Stating Cause of Action as to All Plaintiffs.*—A complaint which does not state a good cause of action as to all, though it does as to some of the plaintiffs, is bad as to all, for want of facts sufficient to constitute a cause of action. *Ib.*
4. *Indefinite Complaint.—Demurrer.*—A demurrer does not raise the question as to whether or not a complaint is sufficiently definite. *Clow v. Brown, 185.*
5. *Action to Set Aside Settlement for Fraud.—Complaint.*—In an action to avoid a settlement because of alleged fraud, where the facts are stated entitling the plaintiff to such relief, and there is a general prayer for judgment and other proper relief, it is not necessary that the complaint contain a specific prayer that the settlement be set aside on the ground of fraud. *McIntosh v. Zaring, 301.*
6. *Action of Ejectment.—Trespass.—Necessary Allegations.*—An action based upon a paragraph of complaint stating facts sufficient to constitute an action for trespass, damage, and for an injunction, and which does not allege that plaintiff was entitled to the possession of the premises described, nor that the defendant unlawfully kept him out of the possession thereof, will be held to be an action for trespass, and not an action to recover the possession of the real estate. *Nutter v. Hendricks, 605.*
7. *Supplemental Complaint.—Slander.*—Defamatory words uttered by defendant after the commencement of an action for slander constitute a separate and distinct right of action, and cannot be brought into the original action by means of a supplemental complaint. *Barker v. Prizer, 4.*
8. *Cross-Complaint.—Foreclosure of Chattel Mortgage.*—A cross-complaint, in an action to foreclose a chattel mortgage, claiming the property under a prior mortgage, which does not allege that the property described in the cross-complaint is the same as that described in plaintiff's mortgage, is insufficient. *Zumpfe v. Kelley, 634.*
9. *Sham Pleading.*—Section 385, Burns' R. S. 1894, providing that a pleading may be rejected as sham where it plainly appears on its face, or by answer to interrogatories, to be false or intended for delay, does not authorize the court to reject a pleading upon answers to interrogatories tending to show that the facts averred in the pleading were false, where the court could only reach the conclusion that the allegations were false by weighing and balancing the probabilities arising from certain inferences to be drawn from physical facts stated in such answers. *Pittsburgh, etc., R. W. Co. v. Fraze, 576.*
10. *Demurrer.*—A demurrer to a complaint for want of facts raises the question of the right of the plaintiff to maintain the action. *Kinsley, Guardian, v. Kinsley, 67.*
11. *Demurrer.*—A demurrer does not raise the question of the sufficiency of a complaint where such defect could properly be reached by a motion to make the allegations of the complaint more specific. *Rodgers v. Baltimore, etc., R. W. Co., 398.*
12. *Answer.—Form of Demurrer.*—A demurrer to an answer as not stating facts "sufficient to constitute a good answer to the complaint of the plaintiff," does not question the sufficiency of the answer as stating a cause of defense. *Wintrade v. Renbarger, 556.*

13. *Overruling a Demurrer.—Harmless Error.*—The overruling of a demurrer to a bad answer is harmless where there was a special finding of facts by the court, and the facts found could have been proved as well under another paragraph of plaintiff's answer.
Watson v. Tindall, 488.

14. *Answer.*—Where an answer is directed to an entire complaint consisting of several paragraphs, in order to withstand a demurrer, it must be good as to all of the paragraphs. *Walker v. Walker, 317.*

15. *Estoppel.*—Facts creating an estoppel, to be available, must be specially pleaded.

Center School Tp. v. State, ex rel. Board, etc., 168.

16. *Joinder of Plaintiffs in Action to Avoid Settlement.*—Three firms of attorneys had contracts with the same client by the terms of which several contracts the client was to pay a certain per cent. of the amount recovered. The cause was compromised, and by fraud the attorneys induced to accept a smaller sum in full settlement and discharge of the contract than was due them. *Held*, that the several firms might join in an action to avoid the settlement.
McIntosh v. Zaring, 301.

POLICE POWER—To regulate the practice of medicine, as provided by act of March 8, 1897, is a proper exercise of the police power of the State. See **PHYSICIANS, 1**; *State, ex rel., v. Webster, 607.*

PRACTICE—A demurrer does not raise the question of the sufficiency of a complaint where such defect could be properly reached by a motion to make the allegations of the complaint more specific.
Rodgers v. Baltimore, etc., R. W. Co., 398.

A demurrer to a complaint for want of facts does not raise the question of the right of the plaintiff to maintain the action.

Kinsley, Guardian, v. Kinsley, 67.

A demurrer does not raise the question of the definiteness of the complaint.

Clow v. Brown, 185.

Where the grounds for a demurrer do not appear on the face of the complaint, and defendant files answer, as provided by section 346, Burns' R. S. 1894, and issue is joined, and the proof establishes the truth of the answer, the complaint will be defeated in the same manner as if the facts of the answer appeared in the complaint, and a demurrer had been sustained to it.

McIntosh v. Zaring, 301.

In action for writ of assistance, see **WRIT OF ASSISTANCE**; *Roach v. Clark, 93.*

The statute does not require a specific finding to be entered of record of each of the elements of proof in probating a will where the proof itself is entered of record.
Baker v. Cravens, 199.

The court may disregard the verdict of the jury in an equity case and enter its own finding. See **EQUITY, 1**; *Seisler v. Smith, 88.*

A person on trial for larceny who becomes a witness in his own behalf may be asked, on cross-examination, concerning a former conviction. See **CRIMINAL LAW, 8**; *Vandeleave v. State, 273.*

1. *Harmless Error.—Overruling Demurrer to Bad Pleading.*—It is harmless error to overrule a demurrer to a paragraph of complaint which fails to state a cause of action, where it affirmatively ap-

pears that the verdict and judgment rested upon other paragraphs of the complaint.

Ervin v. State, ex rel., 332; *Lowry v. Downey*, 364; *Cincinnati, etc., R. R. Co. v. Cregor, Admr.*, 625.

2. *Overruling Demurrer to Bad Pleading.—Reversal of Judgment.*—The provision of section 848, Burns' R. S. 1894 (845, R. S. 1881), that "no objection taken by demurrer and overruled shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined," has no application to a cause where the record fails to show that the ruling on the demurrer was harmless. *Ervin v. State, ex rel.*, 332.
3. *Carrying Demurrer to Answer Back to Complaint.*—The right to carry a demurrer back to, and sustain it to the complaint, depends entirely on whether the facts stated in the answer as an objection to the complaint, and admitted by the plaintiff's demurrer to said answer, can be considered as a part of the facts on which the complaint rests. *McIntosh v. Zaring*, 301.
4. *Judgment.—Modification.*—Where a judgment gives the party obtaining the same greater or less relief than he is entitled to under the verdict or finding, the remedy is by motion to modify the judgment. *Jarrell, Sheriff, v. Brubaker, Admr.*, 260.
5. *Motion to Modify Judgment.—Must Be Good as a Whole.*—Motions to modify judgments or interlocutory orders, or motions to strike out evidence, pleadings, judgments, or interlocutory orders must be good as a whole. *Baum v. Thoms*, 378.

PRESUMPTIONS—As to disputable and conclusive presumptions of law, see **LARCENY**, 4, 5; *Campbell v. State*, 74.

Wills.—Presumptions are in favor of intestacy.

Mortgage Trust Co. v. Moore, 465.

PRINCIPAL AND SURETY—See **MARRIED WOMEN**; **HUSBAND AND WIFE**.

The partial payment of a promissory note by the principal debtor will not suspend the statute of limitations as to the surety.

See **LIMITATION OF ACTIONS**, 1; *Mozingo v. Ross*, 688.

The absence of the principal debtor of a promissory note from the State will not suspend the statute of limitations as to the surety.

See **LIMITATION OF ACTIONS**, 2; *Ib.*

PROCESS—When service of process on a cross-complaint filed by a junior lien holder, in an action to foreclose a mortgage is unnecessary, see **JUDGMENT**, 8; *Thompson v. Harlow*, 450.

QUART SHOP LAW—Constitutionality of, see **INTOXICATING LIQUORS**, 1, 2; *Daniels v. State*, 348.

QUIETING TITLE—When administrator may maintain an action to set aside a fraudulent conveyance and to quiet title, see **DECEDENTS' ESTATES**, 5; *Jarrell, Sheriff, v. Brubaker*, 260.

Where upon judicial sale sheriff sells wrong tract of real estate, see *Allen v. Adams*, 409.

Where a new trial as of right is not granted, see **NEW TRIAL**, 3, 4; *Nutter v. Hendricks*, 606; *Seisler v. Smith*, 88.

Survey.—Consent to Making Survey.—Effect Of.—The fact that a person holding land by adverse possession consented to a survey thereof will not estop the holder from asserting title to the land,

regardless of the survey, as the only effect of such consent was to dispense with the notice required by statute. *Wood v. Kuper*, 622.

QUO WARRANTO—Information in the nature of a *quo warranto* is the proper remedy to determine the right to an office. See *INJUNCTION*, 3; *Carmel Natural Gas, etc., Co. v. Small*, 427.

Officers.—Statute Construed.—Sections 1145, 1146, Burns' R. S. 1894, authorize a suit in the nature of *quo warranto* in the name of the State against one alleged to be unlawfully usurping and intruding into the office of county superintendent belonging of right to relator. *State, ex rel. Bishop, v. Crowe*, 455.

RAILROADS—Land used by a railroad company for the use of its road may be appropriated by a city for street purposes.

Powell v. City of Greensburg, 148.

Increase of assessment of personal property, see *TAXATION*, 3; *Chicago and Erie R. R. Co. v. John, Treas.*, 113.

1. *Public Aid.—Statutes Strictly Construed.*—Railroad aid laws, as they, in a manner, deprive the owners of the full control and disposition of their property, by giving to others the power to encumber it, should be strictly construed in favor of the rights of property. *Demaree v. Johnson*, 419.

2. *Public Aid.—Tax Levy.—Remonstrance.*—Where only the legality of the election and the action of the board of commissioners in making the levy is questioned, a remonstrance against the levy, on the ground that it was placed upon the tax duplicate before the road had been permanently located, is demurrable. *Ib.*

3. *Public Aid.—Irregularities of Election.*—A railroad aid tax will not be overthrown for mere irregularities in the election that do not affect substantial rights. *Ib.*

4. *Condemnation of Land.—Lien for Damages Awarded.—Mortgage.*—A claim for the payment of land condemned by a railroad company is superior to any lien afterwards placed upon said land whether by operation of a previous or subsequent mortgage. *Coburn v. Sands*, 141.

5. *Condemnation of Real Estate.—Abandonment of Interest in Condemned Realty.*—In accordance with section 5160, Burns' R. S. 1894, a railroad company, in the year 1880, condemned and appropriated a strip of land adjoining its right of way. The damages awarded were never paid, and no demand therefor was made till 1889. The company did not take formal possession of said land till 1887, and then, within a few days, suffered itself to be dispossessed by another railroad company. To the latter company, the original owners of the land, for a valuable consideration, executed a warranty deed. *Held*, that the acts, both of the original owners of the land, and the railroad company to which the land was first awarded, amounted to an abandonment of all claims under the condemnation proceedings. *Ib.*

6. *Blowing Whistle.—Damages.—Complaint.*—A complaint against a railroad company for damages for personal injuries which alleges in general terms that defendant carelessly, negligently, recklessly, and without any necessity whatever, caused the whistle of its locomotive to be blown, thereby frightening plaintiff's team, causing it to run away, and resulting in the injuries of which he complains, without any fault on the part of plaintiff, states a cause of action as against a demurrer for want of facts.

Rodgers v. Baltimore, etc., R. W. Co., 398.

7. *Blowing Whistle.—Not Negligence Per Se.*—The mere sounding of a locomotive whistle, even at a place of extraordinary danger, is not negligence *per se*, but a railroad company is liable for its negligence in blowing a locomotive whistle from which horses are frightened and caused to do injury. *Ib.*
8. *Accident at Crossing.—Burden of Proof.*—Where a person is injured by a collision with a train, while crossing a railroad track, the fault is *prima facie* his own, and before a recovery can be had for such injury, it must be shown not only that he looked and listened without seeing or hearing the train in time to escape, but that he could not have seen it or heard it in time to have escaped if he had looked and listened. *Pittsburgh, etc., R. W. Co. v. Frazee, 576.*

RAPE—

Evidence.—In a prosecution for rape the evidence of the prosecuting witness was that she was seventeen years of age; that she was attacked at a lonely place in the highway, and after release by her assailant she sought protection in the nearest residence, and complained to her mother immediately upon returning home; that she at once made affidavit for the arrest of defendant and his brother. Her evidence was in part corroborated by her parents, the physician, the officers, and by the admissions of appellant's brother. *Held*, that the evidence was sufficient to support a conviction.

Sutherland v. State, 154.

REAL ESTATE—

Wife's Inchoate Interest.—Release Of.—A husband made a contract to convey certain real estate in which contract his wife did not join. Upon his refusal to execute the conveyance suit for specific performance was commenced, and *his pendens* notice setting forth a description of the real estate and the nature of the plaintiff's rights and interest sought to be enforced was duly filed. Pending suit for specific performance the husband and his wife joined in a conveyance of the real estate to S, who reconveyed to the husband. The court afterwards ordered a conveyance by the husband under the contract, which conveyance was made by a commissioner. *Held*, in an action by the vendee against the wife to quiet title, that by joining in the deed to S she had relinquished her inchoate interest in the real estate.

Sharts v. Holloway, 405.

RECEIVERS—The appointment of a receiver to take charge of attached property is no abandonment of the attachment. See ATTACHMENT, 8; *Runner, Assignee, v. Scott, Ecr., 441.*

1. *Appointment.*—It is not necessary in an appeal from an interlocutory order appointing a receiver to inquire into the sufficiency of the complaint as the foundation of a cause of action. It is enough if, from the verified pleadings and affidavits, there was sufficient ground shown for the appointment of a receiver.
Goshen Woolen Mills Co. v. City National Bank of Goshen, 279.
2. *Appointment.—Interest of Petitioner.*—A receiver will not be appointed on petition of one whose complaint shows no right of ultimate recovery in the action. *Ib.*
3. *Appointment.—Interest of Petitioner.—Assignment for Benefit of Creditors.*—Where a trust deed for certain creditors provides that any surplus arising from the sale of the property after the satisfaction of such creditors shall be paid to grantor, a general creditor has such an interest as to give him the right to apply for a receiver, where there is a possibility that there will be a surplus. *Ib.*
4. *Appointment.—Fraud.*—Under the provisions of section 1236,

Burns' R. S. 1894 (1922, R. S. 1881), that a receiver may be appointed where the property in controversy is in danger of being materially injured, where a corporation is insolvent or in imminent danger thereof, the court may appoint a receiver for property assigned by the corporation for the benefit of certain creditors, although no fraud is shown in such assignment, if, in the opinion of the court, such action is necessary to secure ample justice to the parties. *Id.*

ROBBERY—The defendant may be convicted of larceny under an indictment charging robbery. *Vancleave v. State, 273.*

SALES—See **CONTRACT**.

Of lands mortgaged to school fund, see **MORTGAGES**, 2, 3, 4, 5; *Richardson v. Hedges, 53.*

When notice to sell land for taxes at public sale constitutes sufficient notice to sell same at private sale, see **TAXATION**, 4; *Newton v. Roper, 630.*

SCHOOLS AND SCHOOL DISTRICTS—

1. *Abandonment of School. — Removal of School Site. — Township Trustee.*—Section 5920a, Burns' R. S. 1894 (Acts 1893, p. 17), limiting the power of township trustees in the removal of school buildings, and changing the sites thereof, does not apply to the action of a township trustee in abandoning or discontinuing a school in a certain district in the township on account of the small attendance of pupils. *Davis v. Mendenhall, Tr., 205.*
2. *Apportionment of School Revenue by County Auditor.*—A township is not entitled to any of the school fund collected from the tax assessed under the general law so long as the interest on the congressional fund of such township alone amounts to more per capita than was left in the hands of the county auditor to apportion to other townships. *State, ex rel., v. Matthews, Aud., 597.*
3. *Apportionment of School Revenue.*—The common school fund derived from other sources than interest on the congressional township fund, may be validly and constitutionally unequally distributed by statutory authority, so as to make the whole, including the congressional township fund, when distributed, as nearly equal per capita to each school corporation as possible. *Id.*

SLANDER—See **LIBEL AND SLANDER**.

Supplemental complaint in action for, see **PLEADING**, 7; *Barker v. Prizer, 4.*

SOLDIERS' MONUMENT—

Statutes Construed.—Expenses of Decoration of Monument.—From Which Fund Paid.—Under the act of March 4, 1893 (Acts 1893, p. 805), re-appropriating the funds provided by the act of March 7, 1891, for the completion and decoration of the soldiers' and sailors' monument, construed with the act of March 6, 1895 (Acts 1895, p. 184), which substitutes a board of regents for the commissioners, and provides that they shall serve without pay, except necessary expenses, and an annual salary of \$1,500.00 to the president, to be paid out of the general fund of the State; the clay models from which the decorations of the monument known as the "peace" and "war" groups, and the pumps and engines to operate the fountains, which were parts of the original plan for the construction of the monument, are essentials, and not merely incidental to the completion and decoration of the monument, and payment therefor cannot be made out of the general fund of the State, but

must be paid out of the "monument fund" created by the special act.
Board of Regents, etc., v. Daily, Aud., 668.

SPECIAL FINDINGS—When erroneous conclusion of law is harmless, see **APPEAL AND ERROR**, 84; *Coburn v. Sands, 141.*

Exception to conclusions of law is an admission that the facts have been fully and correctly found. See **APPEAL AND ERROR**, 88; *Blair v. Curry, 99.*

When do not sustain conclusion of law, see **SUBROGATION**, 8; *Davis v. Schlemmer, Admr., 472.*

As to motion to restate and enlarge, see **APPEAL AND ERROR**, 88; *Singer, Admr., v. Tormoehlen, 287.*

The overruling of a demurrer to a pleading will be considered on appeal, although there has been a special finding of facts with conclusions of law thereon, where, to the conclusion of law, no exceptions were taken. See *Runner, Assignee, v. Scott, Exr., 441.*

1. *Evidence.—Weight Of.*—In determining whether a special finding is sustained by the evidence the Supreme Court will consider only such evidence as tends to sustain the finding.

Robinson & Co. v. Hathaway, 679.

2. *Evidentiary Facts.—Venire de Novo.*—Where a special finding includes evidentiary facts which are not sufficient to establish any inferential fact within the issues that is not stated in the finding, a motion for a *venire de novo* is properly overruled.

Hawkins, Rec., v. Fourth Nat'l Bank, etc., 117.

SPECIAL VERDICT—

1. *Formal Defects.*—A special verdict will not be set aside on account of mere formal defects, where it does not appear that any objection was made to the verdict when it was received.

Salem-Bedford Stone Co. v. O'Brien, 656.

2. *Improper Interrogatories.—Harmless Error.*—It is error to submit to a jury interrogatories calling for evidentiary facts or conclusions of law; but such error is harmless for the reason that the court in applying the law to the special verdict is required to disregard such interrogatories and the answers thereto.

Roller v. Kling, 169.

3. *Proper Instruction When Special Verdict is to be Returned.*—Where a special verdict is to be returned, it is only proper for the court to instruct the jury as to the issues made by the pleadings, the rules for weighing and reconciling the testimony, who has the burden of proof as to the facts to be found, with whatever else may be necessary to enable the jury to understand clearly their duties concerning such special verdict, and the facts to be found therein. *Id.*

4. *Instructions as to the Law.—Harmless Error.—Practice.*—Where a special verdict is to be returned, general instructions as to the law of the case are not necessary, and available error cannot be predicated upon the giving of such. *Id.*

STATE—

Courts Open To.—The courts of the State and of the United States are open to the State, both in its sovereign capacity and by virtue of its corporate rights. *State v. Ohio Oil Co., 21.*

STATUTORY CONSTRUCTION—

1. *Intention of Legislature.*—In order to ascertain the intention of

the legislature the court should look to the letter of the statute, to it as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief to be remedied, to other statutes, to the rules of the common law, and to the condition of affairs when the statute was enacted.

State Board of Tax Commissioners v. Holliday, 216.

2. *Scope of Statute.—Preamble.*—If, on review of the whole act, a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it, notwithstanding the less extensive import of the preamble. *State v. Ohio Oil Co.*, 21.
3. *Incomplete Statute.*—The rule that general statutes give way to special statutes upon the same subject, applies only when the special statute is complete within itself. *Daniels v. State*, 348.
4. *Repeal of Statute.—Repeal of Repealing Act.—Common Law Rule.*—Where a statute or rule of the common law is repealed or modified, and the repealing or modifying act is afterwards expressly or impliedly repealed by an act which manifests no intention that the statute or common law rule repealed or modified shall continue repealed, the common law rule is that the repeal of the repealing or modifying act revives the act or common law rule so repealed or modified. *Baum v. Thoms*, 378.
5. *Repeal of Repealing Act.—Common Law Rule Changed.*—The common law rule in regard to the effect of the repeal of a repealing act has been changed, so far as the same applies to acts of the legislature, by section 248, Burns' R. S. 1894 (248, Horner's R. S. 1897), but the rule as to the repeal of an act repealing or modifying a rule of the common law remains unchanged, and the repeal of the act repealing or modifying the common law rule revives the rule *ab initio*, and it exists the same as if it had never been repealed. *Ib.*
6. *Doing Business Without License.—Statute Applicable to Future Legislation.*—In section 2186, Burns' R. S. 1894, prescribing a penalty for the transaction of any business without a license when such license is required by law, the words of the statute are comprehensive, and apply as well to future as existing legislation. *Daniels v. State*, 348.
7. *Amendment.—Vacation Appeals.—Notice.*—The act of 1897 (Acts 1897, p. 277), purporting to amend section 652, Burns' R. S. 1894 (640, R. S. 1881), providing that service of notice upon appellee's attorney of record shall be sufficient in vacation appeals is invalid for the reason that it does not express the subject thereof in its title by reference to the act or the title of the act to be amended. *O'Mara, Admr., v. Wabash R. R. Co.*, 648.

STREET IMPROVEMENTS—See MUNICIPAL CORPORATIONS.

An injunction will lie to prevent an abutting property owner from making street improvements materially different from that provided by ordinance. See MUNICIPAL CORPORATIONS, 9; *Drew v. Town of Geneva*, 662.

The board of trustees of an incorporated town is invested with plenary powers and exclusive jurisdiction over the streets and the improvement and repair thereof. *Ib.*

1. *Action to Enjoin Collection of Assessments.—Municipal Corporations.*—An action to enjoin the collection of assessments made against property owners for street improvements is a collateral attack upon the proceedings of the town board, and can be maintained only by the affirmative disclosure of some act or omission

rendering the assessments invalid for the want of jurisdiction, and it cannot be sustained for any mere irregularity in the proceedings.

Pittsburgh, etc., R. W. Co. v. Town of Crown Point, 536.

2. *Petition by Property Owners.*—Street improvements are authorized upon a vote of two-thirds of the membership of a board of town trustees without a petition by the abutting property owners. *Ib.*
3. *Ordinance.*—A recital in an ordinance for street improvements that the same was passed by a two-thirds vote of the board, amounts to a finding upon such fact, and is conclusive against a collateral attack. *Ib.*

STREETS—Opening and extension, see **MUNICIPAL CORPORATIONS**, 3, 4; *Powell v. City of Greensburg, 148.*

The proper use of a street for a telephone system is not an additional servitude for which the abutting property owner is entitled to compensation. See **TELEPHONE**, 1; *Mages v. Overshiner, 127.*

SUBROGATION—

1. *Vendor's Lien.*—Where a third party pays a note secured by a vendor's lien, under an agreement with the makers that he is to hold the note with the lien as security, the person so paying the note will be subrogated to the rights of the vendor, as against a subsequent mortgagee. *Warford v. Hankins, 489.*
2. *Right of Not Founded Upon Contract.*—*Equity.*—The right of subrogation is not founded upon contract, express or implied, but upon principles of equity and justice, and includes every instance in which one party, not a mere volunteer, pays a debt for another, primarily liable, and which in good conscience should have been paid by the latter. *Ib.; Davis v. Schlemmer, Admr., 472.*
3. *Replevin Bail.*—*Special Findings.*—*Injunction.*—Defendant became replevin bail for stay of execution of a judgment at the request of one not a party, but interested in the payment of the judgment, and was compelled by the judgment creditor to pay same; the judgment defendant brought suit to enjoin replevin bail from collecting the judgment, and for the cancelation thereof. *Held*, that the court erred in rendering judgment granting such relief, where the special findings on which the judgment was rendered did not show that the protection of the property and interests of replevin bail or that of the person who procured such stay of execution did not require the payment thereof.

Davis v. Schlemmer, Admr., 472.

SURETYSHIP—See **PRINCIPAL AND SURETY**.

SURVEY—The fact that a person holding land by adverse possession consented to a survey thereof will not estop the holder from asserting title to the land, regardless of the survey, as the only effect of such consent was to dispense with the notice required by statute. *Wood v. Kuper, 622.*

TAXATION—An action may be maintained against a school township by a city located therein for the recovery of surplus dog tax funds wrongfully appropriated. See **TOWNSHIP TRUSTEE**, 1, 2; *Center School Tp. v. State, ex rel., 168.*

1. *Legislature Selects Subjects for Taxation.*—*Property Not Taxable.*—It is a legislative power to select the subjects for taxation, and the constitution imposes the duty and limitation upon the legislature of providing by law regulations or methods for a just valu-

ation of all property, both real and personal, and where the legislature does not prescribe such regulation as to any particular species of property, such property cannot be taxed.

State Board of Tax Commissioners v. Holliday, 216.

2. *Insurance Policies Not Taxable.*—Paid up non-forfeitable and partly paid up life insurance policies are not subject to taxation, as there is no statute providing any regulation for, or any manner of assessing or valuing such policies. *Ib.*

8. *Personal Property of Railroad Company.*—*Assessment.*—*Notice.*—Where, under sections 8501, 8502, Burns' R. S. 1894, a railroad company returns a schedule and valuation of its personal property to the county auditor, and such auditor submits the same to the assessor to be assessed, the railroad company is not entitled to notice before the assessor can make the assessment at a greater valuation than that returned by the company.

Chicago etc., R. R. Co. v. John, Treas., 115.

4. *Tax Sales.*—*Notice.*—*Private Sale.*—A notice to sell lands for taxes at public sale constitutes a sufficient notice to sell same at private sale under sections 247, 248, 249, of the tax law of 1872 (R. S. 1876, p. 127), and such provision is not in conflict with the federal constitution in that it deprives the owner of his property "without due process of law." *Newton v. Roper, 630.*

TELEPHONE—

1. *Construction Of in Streets.*—*Rights of Abutting Property Owner.*—The reasonable use of the streets of a city for the poles, wires, and necessary equipment of a telephone system is not a new and additional servitude for which the abutting property owner is entitled to compensation. *Magee v. Overshiner, 127.*
2. *Ownership by Individual.*—An individual may own and operate a telephone system without legislative consent, where there is no legislative restriction upon such right. *Ib.*

THEORY—The entire record and briefs of counsel on both sides may be considered on appeal for the purpose of ascertaining the theory of the complaint. *Carmel Natural Gas, etc., Co. v. Small, 427.*

TOWNSHIP TRUSTEE—

1. *Constructive Trust.*—*Surplus Dog Tax Fund.*—*Overruled Cases.*—*Vested Rights.*—Where dog tax funds were appropriated to the school township by the township trustee, under a construction placed upon the law by the Supreme Court, the township did not thereby obtain such a vested right in such funds as to prevent the recovery thereof by the board of school commissioners of a city located in such township, under a decision of the Supreme Court overruling the former decision.

Center School Tp. v. State, ex rel. Board, etc., 168.

2. *Surplus Dog Tax Fund.*—An action may be maintained against a school township by the board of school commissioners of a city located in such township for the recovery of surplus dog tax funds wrongfully appropriated by the township trustee to the use and benefit of the school township. *Ib.*

TRUSTS—

Advancement to Wife by Conveyance to Husband.—A conveyance to a husband by his wife's father, as an advancement to her, the transaction being free from fraud, does not create a constructive trust. *Meredith v. Meredith, 299.*

USURY—

1. *Voluntary Payment of Usurious Interest.*—The payment of usurious interest is not a voluntary payment in such sense as to entitle the receiver to retain the amount paid above the legal interest, but such payment is regarded as under the constraint of a formal, though illegal, contract, obtained by taking advantage of the necessities of the borrower, and, therefore, excepted from the ordinary rule that one voluntarily paying money on an illegal claim cannot maintain an action to recover such payment.

Baum v. Thoms, 378.

2. *Recovery of Usurious Interest Voluntarily Paid.—Common Law Action.—Assumpsit.*—A borrower who has paid more than the legal rate of interest is not confined to the remedy given by statute, but may maintain assumpsit at common law to recover back the excess of interest paid, on paying or offering to pay the money lent with lawful interest.

Ib.

3. *Complaint to Cancel Mortgage.—Sufficiency.*—A complaint to set aside a mortgage which alleges that defendants were loaning money at usurious interest; that they had separate places of business, but a mutual understanding and arrangement between themselves by which the loans were changed from one to the other in order the more successfully to carry on the business of loaning money at illegal and usurious interest; that plaintiff borrowed \$25.00 in 1891, and \$50.00 in 1892, under an agreement that she was only to pay interest at the legal rate, and that she paid thereon, principal and interest, \$175.00, when in 1894 they claimed that there was yet due \$150.00; that she finally executed the mortgage and note for \$112.60, on account of the threats, importunities, and oppressive conduct of the parties, set forth in the complaint, states facts sufficient to withstand a demurrer.

Ib.

VENDOR'S LIEN—Where a third party pays a note secured by a vendor's lien, under an agreement with the maker that he is to hold the note with the lien as security, the person so paying the note will be subrogated to the rights of the vendor, as against a subsequent mortgagee.

Warford v. Hankins, 489.

1. *Reservation of in Deed.—Notice.*—A lien reserved in a deed conveying real estate is notice to a subsequent mortgagee of the rights of those claiming under such lien.
2. *When Reserved in Deed.—Mortgage.—Subrogation.*—For the purposes of subrogation there is no difference between a vendor's lien expressly reserved in the deed and a mortgage given by the vendor to secure the purchase money.
3. *Exchange of Property.*—Where, in an exchange of real estate, one of the parties agreed as a part consideration of the trade that she would pay off and discharge certain liens against the property conveyed by her, upon her failure to do so the grantee may pay off and discharge such liens, and recover from her the amount thereof as the balance of purchase money of the real estate taken in exchange, and enforce a vendor's lien therefor on the real estate conveyed to her.

Louvy v. Downey, 364.

VENIRE DE NOVO—When motion for is properly overruled, see SPECIAL FINDINGS, 2; *Hawkins, Rec., v. Fourth Nat'l Bank, etc., 117.*

WILLS—Presumptions are in favor of intestacy.

Mortgage Trust Co. v. Moore, 465.

Appellant cannot complain of a judgment of the court denying his petition to cancel the record probating a will and to be permitted to make due probate thereof, where such judgment was based upon a finding that the will was properly probated.

Baker v. Cravens, 199.

1. *Probate.*—Section 3754, Burns' R. S. 1894, *et seq.*, does not require a specific finding to be entered of record of each of the elements of proof in probating a will, where the proof itself is entered of record. *Ib.*
2. *Probate.*—*Clerical Error.*—Where the probate order book containing the record of the probate of a will refers to the testatrix as Mary Baker, but the will and the proof made a part of the record identifies the will as that of Martha V. Baker, and discloses the error of the clerk in making the entry, such error will not defeat the probate thereof, nor cast a cloud on the title to the real estate devised. *Ib.*
3. *Proof of Insanity Prior to Execution of Will.*—*Burden of Proof as to Return of Sanity at the Time of Execution.*—In an action to set aside a will on the ground of mental unsoundness, proof on the part of the plaintiff that the testator, prior to the time of the execution of the will, was a person of unsound mind, not from a temporary cause, does not require the defendant to show by a preponderance of the evidence a return of sanity, or a lucid interval, at the time of the execution of the will.

Roller v. Kling, 159.

4. *Deed.*—*Delivery.*—*When Deed and Will Construed Together.*—A father made and acknowledged a deed to his son, but did not deliver it. Afterward the father made a will in which he referred to the deed, stating that he had "conveyed" the land described therein to his son, and directed that the deed be delivered at his death. *Held*, in an action to enforce a provision of the will making a legacy a lien on the real estate, that the deed and will should be construed together.

Mortgage Trust Co. v. Moore, 465.

WITNESSES—Instruction to the jury as to credibility of, see INSTRUCTIONS, 3; *Cincinnati, etc., R. R. Co. v. Cregor, Admx., 625.*

A person on trial for larceny who becomes a witness in his own behalf may be asked on cross-examination concerning a previous conviction. See CRIMINAL LAW, 8; *Vancleave v. State, 273.*

1. *Competency.*—*Decedents' Estates.*—Section 506, Burns' R. S. 1894, providing that "in all suits in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record whose interest is adverse to such estate, shall not be a competent witness against the estate," does not render the administratrix, who is the widow of decedent, incompetent to testify to matters occurring prior to the death of decedent, in an action for damages for his death, where her interest was not adverse to the estate, and she did not testify against the estate, but in favor of it. *Cincinnati, etc., R. R. Co. v. Cregor, Admx., 625.*
2. *Competency.*—*Decedents' Estates.*—*Action in Tort.*—The provision of section 507, Burns' R. S. 1894, that "in all suits by or against heirs or devisees, founded upon a contract with or demand against the ancestor, to obtain title to or possession of property, real or

personal, of or in right of such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor," is not applicable to an action in tort for damages for the death of decedent. *Ib.*

8. *Impeaching Question.—Form Of.*—A question put to an impeaching witness need not be in the exact words of the question asked of the witness sought to be impeached, but the words should be identical as to time, place, and substance, and the impeaching question should be so framed as to admit of a negative or affirmative answer. *Roller v. Kling, 159.*

WRIT OF ASSISTANCE—

When Should Not Be Granted.—Plaintiff filed his petition for a writ of assistance to obtain possession of lands sold to him at administrator's sale. Defendant filed a cross-action to quiet title, to which plaintiff answered alleging matters of estoppel *in pais* against defendant to assert his claim of title. *Held*, that the cross-demand and answer thereto departed from the theory upon which the application for the writ could rest, and, when filed, the writ should have been denied. *Roach v. Clark, 93.*

6th 62.



